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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 27.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

MAY—AUGUST, 1886.

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CASES

ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

BARRY v. MISSOURI, K. & T. Ry. Co. and another.

(Circuit Court, S. D. New York. March 22, 1886.

1. CIRCUIT COURT—JURISDICTION—CITIZENSHIP—TRUSTEE OF INCOME MORTGAGE NOMINAL DEFENDANT.

A., the owner of certain coupons and scrip certificates of unpaid interest owing by a foreign railroad corporation upon bonds secured by an income mortgage, in behalf of himself and other owners of coupons and certificates, filed a bill in the circuit court against the railroad company, and the Union Trust Company, a citizen of the same state as himself, which was the trustee named in the income mortgage, to compel an accounting, and for an injunction against the appropriation of the earnings of the railroad company contrary to the rights of the income bondholders, and for a decree for the payment of the income applicable to the interest, averring that the trust company was made defendant because it asserted that no duty was imposed on it in respect to the matters involved in the suit, and had refused to bring suit when requested so to do. *Held*, that the circuit court had jurisdiction.

2. RAILROAD COMPANY—MORTGAGE BONDS—"NET EARNINGS" DEFINED.

As a general proposition, the "net earnings" of a railroad company are the excess of the gross earnings over the expenditures defrayed in producing therein, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves.

3. SAME—MORTGAGE OF MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage; and the company cannot charge against income, for any period during the life of the mortgage, a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness.

4. SAME—ACCOUNTING—INTEREST.

Where a mortgage is executed by a railway company to a trustee, conditioned for the payment of interest upon the bonds secured by the mortgage at semi-annual periods out of the surplus earnings of the company, the mortgagor owes a duty to the bondholder to keep such an account of its earnings and expenses as will show the net results of each interest period, and the trustee owes an active duty to the bondholders in the supervision of the account.

5. SAME—APPLICATION OF INTEREST ON COUPONS.

Where the bonds are coupon bonds, and such an account has not been kept for a series of years, upon an accounting the holders of coupons are entitled to have the interest earned during each interest period applied upon the coupons representing that period.

6. SAME—ACCOUNTING.

Mortgage and bonds construed, and manner of accounting directed.

In Equity.

Anderson & Man, for complainant.

Dillon & Swayne, for defendant.

WALLACE, J. The complainant is the owner of coupons and scrip certificates representing \$43,462 of unpaid interest owing by the defendant the Missouri, Kansas & Texas Railway Company upon bonds secured by an income mortgage created by it April 1, 1876. He has filed this bill on behalf of himself, and all other owners of coupons and certificates who may desire to join, to compel an accounting by the railway company of its earnings and operating expenses since the making of the mortgage. The bill prays for an injunction against the appropriation of the earnings contrary to the rights of the income bondholders, and for a decree for the payment of the income applicable to the interest. The defendant the Union Trust Company of New York is the trustee named in the income mortgage, and the bill avers that this corporation is made a defendant because it asserts that no duty is imposed on it in respect to the matters involved in the suit, and has refused to bring suit after request on behalf of the complainant and others similarly situated. No relief is sought against the trustee, and it has not answered or appeared in the suit.

The question is presented preliminarily to a consideration of the case upon its merits whether this court has jurisdiction, the complainant and the defendant the Union Trust Company (a New York corporation) both being citizens of this state. The Union Trust Company is a necessary party to the suit, and this has been so determined by this court when the case was before it on a former occasion upon a demurrer to the bill of complaint and the Union Trust Company. No relief is sought against this defendant by the complainant. Its interests and those of the complainant are not adverse, but are identical. In *Pacific R. R. v. Ketchum*, 101 U. S. 289, 298, the court held that the trustees of a mortgage which was being foreclosed at the suit of bondholders might properly be arranged on the same side of the controversy about the foreclosure with the complainants, although they were nominal defendants, because there was no antagonism between them and the complainants, and no relief was asked against them. To the same effect is the case of *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277. These authorities are decisive of the jurisdictional question.

Upon the merits, the questions in the case are (1) whether the mortgagor has failed to apply net or surplus earnings to the payment

of interest upon the bonds; (2) whether the holders of scrip certificates stand in the place of holders of coupons, and are entitled to payment from the surplus earnings; (3) whether the earnings are applicable *pro rata* upon all the coupons unpaid, or only to such as fall due during the period in which earnings were realized that should have been applied to the payment of interest.

The income mortgage was created to secure a series of bonds for the sum of \$1,000 each, amounting in the aggregate to \$10,000,000. Each bond recites that the railway company "is indebted to the Union Trust Company of New York, or bearer, in the sum of one thousand dollars, which the said railway company promises to pay to bearer on the first day of April, 1911, in the city of New York; and from the net or surplus earnings of said railway company to pay, according to the terms of the trust deed or mortgage hereinafter mentioned, interest thereon semi-annually, at the rate of 6 per cent. per annum, at its office in the city of New York, on the first days of April and October in each year, upon the presentation and surrender of the coupons hereto attached as they severally become due; and in case of default in the payment of any of the interest coupons attached to this bond in the manner provided in the said trust deed or mortgage, then, and in that case, the principal sum of this bond shall become due in the manner and with the effect provided in the said trust deed or mortgage." The bond then recites that "the whole series of bonds are secured by a trust deed or mortgage conveying in trust the corporate property, real and personal, land grants, and the franchises and privileges belonging to, or hereinafter to be acquired by, the railway company;" and continues as follows: "The entire income of said property, after the payment of the expenses of operating and keeping the said railway and property in repair, and of the interest on the incumbrances prior hereto, which are more fully set forth in said trust deed or mortgage, is pledged to the payment of these bonds, and the interest thereon, in the manner set forth in said trust deed or mortgage."

The mortgage, the terms of which are thus by reference incorporated into the bonds, enumerates in article second the prior incumbrances upon which interest is to be paid before income applicable to the payment of interest on the bonds is to arise. They amount in the aggregate to \$19,082,000.

The third article of the mortgage recites the promise to pay as recited in the bonds, with the following additional clause:

"And in case at any time the said net or surplus earnings so remaining as aforesaid shall not be sufficient to pay the interest on said bonds as the same becomes due and payable, the said party of the first part [the railway company] shall issue to the holder of the coupons or interest warrants of said bonds a scrip certificate, payable only from the net or surplus earnings of said party of the first part, and which, with interest thereon at the rate of six per cent. per annum, shall be redeemed and paid by said party of the first part before it shall declare or pay any dividend upon its capital stock."

The sixth article of the mortgage recites the promise to pay interest in somewhat different terms from the language of the bond and of the third article of the mortgage, and reads as follows:

"The said party of the first part hereby further agrees that it will pay, or cause to be paid, the said bonds issued and secured by this mortgage, and that it will pay the interest thereon semi-annually, in lawful money, from its net or surplus earnings: * * * provided, said net or surplus earnings shall be sufficient therefor; and that in case its said earnings in any six months shall be insufficient therefor, then for any such deficit said party of the first part agrees to issue a scrip certificate, redeemable, with six per cent. interest, before any dividend shall be declared upon the stock of said company."

The seventh article of the mortgage authorizes the trustee, in case of the neglect of the mortgagor to pay any interest due upon the bonds, and after such neglect shall continue for one year after the interest has been demanded, to enter upon the property, and hold, use, and operate the same until a sale thereof pursuant to the power of sale contained in the mortgage, and to apply the moneys accruing, after deducting the expenses of operating and managing the property, to the payment of the bonds *pro rata*.

The eighth article of the mortgage contains the usual power of sale of the property and franchises, in case of a neglect on the part of the mortgagor to pay the interest upon the bonds, and provides that in case of sale the proceeds shall be applied to the payment of the principal and interest of the bonds unpaid *pro rata*.

It appears by the proofs in respect to the surplus earnings of the company that during the period beginning April 1, 1876, and ending January 1, 1885, there was charged by the company against earnings in its net income account, among others, certain disputable items, amounting in the aggregate to \$3,784,336. If these items are not properly chargeable against the income, the result would be that surplus earnings arose during that period of time to the amount of \$2,073,662, being net profits from the business of the company applicable to the payment of the interest upon the bonds beyond the payment of interest on prior incumbrances and the expenses of maintaining and operating the property. Of these items, one of \$255,275 is for unpaid indebtedness which had accrued against the company before the income mortgage was created; another of \$1,593,665 is for the difference between the face of the income bonds and the sum realized upon them (80 cents on the dollar) by the company; another of \$1,398,935 is for interest on prior incumbrances which the company has not paid, and which the complainant alleges the company is under no obligation to pay; and the other items are likewise for interest for which the complainant alleges the company was not liable.

Respecting the disputed items for interest, it appears by an agreement forming part of the income mortgage that this mortgage was created in order to fund unpaid interest upon existing mortgages of

the company, and to pay off certain other mortgage bonds and the creditors at large of the company. The holders of the first mortgage bonds, the holders of junior mortgage bonds, and the creditors at large, together with the railway company, were parties to the agreement. By the terms of the agreement the holders of the first mortgage bonds were to accept the income bonds which were to be created at 80 cents of their face value, in payment of their unpaid interest; and agreed to reduce their interest for the ensuing six years to 4 per cent. per annum for the first three years, and to 5 per cent. for the last three years, and to accept the income bonds in payment of the difference between the original and reduced rate of interest. The agreement also provided that if at any time the surplus earnings of the railway company should be more than sufficient to pay the interest on the first mortgage bonds at the reduced rate for the six years, and in addition thereto the interest upon the income bonds, the excess of the net earnings should be applied to increase the payment of interest on the first mortgage bonds up to the full amount originally payable thereon.

Unquestionably the bondholders are entitled to an account of the earnings, and the sums charged against the earnings, for each six months from the date of the mortgage, if the proofs justify the conclusion that surplus income has been earned after deducting all payments or liabilities which were legitimately charged against the income during the period of the earnings. The inquiry is whether there is any remainder of earnings after the payment of operating expenses, repairs, prior interest, taxes, etc. It is not essential that the company shall have actually paid the disbursements which arise from these sources during the period of the earnings; it suffices if the company has become liable to pay them, although the time of payment may have been deferred. The expenses and liabilities incurred for the maintenance and operation of the road, and for interest on prior liens during each interest period, are to be charged against the income for that period. The term "net earnings" is defined in the opinion of the court in the case of *Union Pac. R. Co. v. U. S.*, 99 U. S. 420, as follows: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves." The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances, as stipulated by the terms of the mortgage. Applying this rule, it is preposterous to assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might,

with equal propriety, seek to offset its whole funded debt against its income.

It is difficult to understand upon what theory the company assumes the right to charge against income items for interest, some of which has not been paid, and all of which has been discharged to the company by the agreement of the holders of the incumbrances. The company has assumed to charge against the income account the difference between the rate of interest which the first mortgage bondholders agreed to accept for six years and the original rate to which they would have been entitled if the agreement had not been made. The terms of the agreement are so plain that it does not seem possible to misconceive its effect, which was, as was intended, to substitute a reduced rate for the original rate for six years, unless a surplus should arise after the payment of the interest on the income bonds. When the holders of the first mortgage bonds received the income bonds the agreement was fully executed. In the face of this agreement the company undertakes to charge against income, not only the difference between the original and the reduced rate which it has paid to the bondholders for the last two of the six years, but also the difference for the first four years, which has not been paid, but has been funded, and is now represented by the income bonds.

It has been suggested for the company in the argument of its counsel that sanction is found for the position of the company in an adjudication in the suit between the company and the Union Trust Company, in the circuit court of the United States for the district of Kansas; but it is not apparent from the record in that case that any such question as is now presented was directly or indirectly in issue, or was considered by the court.

It is also insisted for the railway company that it can properly charge against earnings the sums required to be set apart annually for a sinking fund under the provisions of the first mortgage; that the company is in arrears nearly \$2,500,000 in its appropriation for this sinking fund; and that, deducting this amount from its gross earnings, there is no net income applicable to interest on the bonds. This mortgage has not been put in evidence, but, assuming its provisions to be as stated in the brief of counsel, the sufficient answer to the contention is that the obligation of the company to the income bondholders is in explicit terms to appropriate all its earnings to the payment of interest upon the income bonds except such as are to be devoted to the expenses of operating and keeping in repair its railway and mortgaged property, and to the payment of the interest on the prior incumbrances. Disallowing the items which have thus been improperly charged against the income account, there is apparently a considerable sum arising from net earnings which should be applied to the payment of the interest on the income bonds.

It remains to consider the principles upon which the accounting should proceed, and this involves an interpretation of the income

mortgage in order to ascertain what is the obligation of the railway company to the bondholders respecting the payment of interest, and what are the rights of holders of coupons and of the scrip certificates. The mortgage creates a pledge during the 35 years between its date and the time of the maturity of the bonds of so much of the net earnings of the railway company—that is, the income after paying the expenses of operation and maintenance, and interest on the prior incumbrances—as may be necessary to pay the interest upon the income bonds. This interest is to be paid at specified semi-annual periods. The promise of the bond is to pay the principal at maturity, and to pay the interest semi-annually, at the rate of 6 per centum, “from the net or surplus earnings;” but in article 6 of the mortgage this promise is further qualified so as to expressly restrict the obligation of the company to pay interest, “provided said net or surplus earnings shall be sufficient therefor.” Consequently, unless within some one of the six-months periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest. By the third article of the mortgage it is provided that in case, at any time, the surplus earnings shall not be sufficient to pay the interest as it matures, the company shall issue to the holders of interest coupons “a scrip certificate, payable only from the net or surplus earnings of the company,” carrying interest at the rate of 6 per cent., which shall be redeemed and paid by the company before it shall declare any dividend to its stockholders. This provision, as well as the language of the bond itself reciting a pledge of the entire income of the property to the payment of the interest on the bond, clearly indicates that although the payment of all interest not earned within any of the interest periods is to be postponed until a future day, nevertheless it is to be paid whenever there is net income applicable thereto. It is not only to be paid when there is a fund applicable to its payment, but it must be paid before any dividend can be declared by the company to the stockholders. The declaration of a dividend would conclude the company from controverting the existence of the fund. Under the terms of the eighth article of the mortgage the certificates, which represent interest payable but not earned, stand upon the same footing as the principal of the bond, and are to be paid out of the proceeds of the sale of the property, or, if the proceeds are not sufficient for the payment in full, are to be paid *pro rata*.

According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably; if there are no net earnings until an exercise of the power of sale un-

der the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings for the period represented by their coupons, but as to earnings from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificate-holders for their interest unearned. It has been suggested that the surrender of a coupon, and the acceptance of a scrip certificate in lieu, is a release of any claim by the coupon-holder upon the surplus earnings of the interest period represented by the coupon. But, as has been stated, the obligations of the company towards the coupon-holder, and his lien upon the surplus earnings, are the same whether he surrenders his coupon or does not. If he does not surrender it, the unearned interest which it represents is solvable by a certificate, and his lien upon the income is restricted to such as arises during the interest period of his coupon. If he does surrender it, there is no new consideration to support a release of interest which belongs to him, or of his lien upon the income for it. If he accepts a certificate for his coupon, he does so upon the representation of the company that there are no net earnings applicable to the present payment of his interest. If this representation is a falsehood, the coupon-holder cannot be prejudiced by it. Every certificate, according to the true construction of the mortgage, represents the unearned interest of the period of a particular coupon or set of coupons; and the coupon-holder and the certificate-holder stand in the same category of creditors, and are entitled to be paid *pro rata* out of the earnings of the interest period represented by their coupons or scrip.

By reason of the obligation of the company, as expressed in the bond and mortgage, to devote the net income semi-annually to the payment of interest, a duty arises by implication, and rests upon the company, to keep such an account of its earnings and its expenditures as will show the net income of each semi-annual interest period applicable to the payment of the interest. The company has not attempted to fulfill this duty, and the trustee for the income bondholders has apparently supinely relinquished to the officers of the railway company the supervision of the accounts which the trustee should have exercised itself. The railway company now produces an account of its income and expenditures, not divided into income periods, but covering a series of years in which there are charges against earnings so palpably unwarranted as to suggest the inference that its officers have strained their ingenuity to conceal a fund which it was their duty to pay over to the bondholders of the bonds. If upon such an accounting as the railway company will be directed to make it should appear that so large a sum has been withheld as there is now reason to suppose, it may become the duty of the court to appoint a receiver to protect the interests of the bondholders which seem to

have been so inadequately protected by the trustee. It is not necessary, however, to decree at present any further relief than such an accounting as will afford the proper basis of a final decree appropriating any sum found due according to the rights of the holders of coupons and certificates.

A decree is ordered directing an accounting by the railway company before a master respecting its earnings and income for six months from the date of the mortgage, and its expenses during the same period for operating and keeping in repair its railway and property, as well as of the sums paid, or which it is liable to pay, for the interest upon the incumbrances prior to the income mortgage specified in the instrument, and for taxes and assessments. Upon such accounting the railway company is to be disallowed any sums paid or charged on account of debts which it had contracted prior to the creation of the income mortgage; is to be disallowed any charge against income arising from the sale of its income bonds at a price less than their face amount; and is to be disallowed any interest upon the first mortgage bonds which it has not actually paid, or become liable to pay, and all which has been funded and is now represented by the income bonds accepted by holders of the first mortgage bonds in lieu of interest. The master will ascertain how much net or surplus earnings have been made by the company during each six-months period, to the time of the filing of the bill. The master will also ascertain the amount of coupons converted into scrip certificates, and the interest periods represented by the certificates, respectively, to the end that it may be finally decreed that the net income of each interest period shall be paid ratably to the holders of coupons or certificates representing interest for the same six months.

CELLULOID MANUF'G CO. v. CHANDLER.¹

(Circuit Court, D. Massachusetts. April 2, 1886.)

1. COSTS—DOCKET FEE.

The taxable costs, as such, provided by sections 823, 824, Rev. St., do not belong primarily to the attorney by force of any law.

2. SAME—SECTIONS 823, 824, REV. ST.

Before the passage of the act of February 26, 1853, of which sections 823 and 824 are a revision, costs were distinctly taxed and allowed "in favor of parties obtaining judgment." Act 1793, c. 20, § 4. The purpose of the act of February 26, 1853, was to secure a uniform rule of taxation in the federal courts, and there was no purpose to change the party in whose favor the allowance was made so as to take the costs from the party to the suit and give them to the attorney.

3. SAME—USAGE.

A usage was claimed by defendant that docket fees and fees allowed for travel and attendance should be taken and treated by the solicitor or attorney

¹Reported by Charles C. Linthicum, Esq., of the Chicago bar.

as his own. This usage was not shown to prevail generally, but appeared from the evidence to be confined to a few states. It was not shown to exist in the community where the complainant resided, nor was it shown that complainant had any knowledge of such usage in the communities where the services were to be rendered. *Held* that, under this state of facts, the complainant could not be held bound by any such usage.

4. SAME—ATTORNEY'S REASONABLE COMPENSATION.

Thirty-six dollars and sixty-four cents for each of 164 cases of like character, *held* to be reasonable compensation for the service of a local solicitor.

In Equity.

Warren & Brandeeds, for plaintiff.

Wm. G. Russell, R. M. Morse, and A. D. Chandler, for defendant.

WEBB, J. The Goodyear Vulcanite Company was the proprietor of a patent for the use of "vulcanite" in setting artificial teeth. The Celluloid Manufacturing Company made and sold to dentists an article called "celluloid," extensively employed for the same purpose. This use of celluloid was by the Goodyear Company claimed to be an infringement of its patent. To protect its alleged rights, it commenced proceedings in equity against a large number of dentists in Maine, New Hampshire, and Massachusetts, as well as in other states, and threatened more. The Celluloid Company issued a circular to dentists everywhere, saying:

"We do not undertake the defense of vulcanite; but if any dentist using celluloid is sued, or if any motion is made to punish a dentist or hold him liable in any way for using celluloid, or if any dentist is summoned before a master for using it, let him notify us at once, sending us any papers served on him, and not agree to admit any evidence in his case, or any record in any other case, on any pretense whatever, nor take any steps in it whatever, until after giving us such notice, and hearing from us or our counsel, * * *; and if we can have control of the case from the outset, we will assume the defense, confident of defeating," etc.

Thereupon the dentists intrusted the defense of the suits against them to the Celluloid Company. The principal counsel relied on to conduct and control the defense being residents of states other than those in which these suits were commenced, Mr. Chandler, the defendant in this case, was retained as local counsel in Massachusetts, and directed to enter his appearance for the defendants in the suits there. Mr. Chandler thereafter acted as local counsel in the Massachusetts cases, attending to the various matters required of him, keeping careful watch of the various steps taken by the complainants, and constantly advising the leading and principal counsel of every movement. The dentists, who were the defendants of record, were frequently applying to him for information and direction, and he was obliged to correspond extensively with them. The answers in the several suits were prepared without Mr. Chandler's assistance, but he kept watch that they should be seasonably filed, and was vigilant to protect all parties against any advantage that might be taken of neglect, delay, or omission in any respect. Only one of all these cases was argued, resulting in a decree that the use of celluloid was not an

infringement of the vulcanite patent. In the preparation of the evidence and the arguments Mr. Chandler took no part.

After the decree in the test case the complainants were allowed time to show, if possible, that the defendants were still liable by reason of having, without license, used vulcanite. Though in fact no effort was made to establish such liability, the mere intimation of the purpose to do so cast upon the solicitor for the dentists the duty of examining each case to determine whether the party was exposed to the charge of using rubber. In the mean time the complainant sought to evade decrees against it for costs by having bills dismissed on its own motion, and in a number of suits obtained entries of that kind. These entries were, however, after hearing, canceled, and costs in those cases, as well as in many others, were allowed the defendants. The argument of the question of costs was participated in by Mr. Chandler, and the taxation was attended to by him.

During this litigation, having entered his appearance for defendants in cases in the districts of Maine and New Hampshire, Mr. Chandler visited Portland and Portsmouth to look after and protect those suits. The whole number of suits in which this defendant appeared was 164. Costs were recovered in 124, exclusive of the test case. These costs amounted to \$4,662.70, exclusive of officers' and witness fees, and were collected by Mr. Chandler from the Goodyear Dental Vulcanite Company, and the Celluloid Company, claiming that the same belonged to it, has commenced this action for their collection, having first demanded payment.

The account rendered by Mr. Chandler charges the Celluloid Company for services in 164 cases in Maine, New Hampshire, and Massachusetts,

For sundry disbursements	-	-	-	\$6,000 00
				228 82

\$6,228 82

And credits two cash payments, of \$250 each,	\$ 500 00
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Cash collected from costs,	-	-	4,662 70
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\$5,162 70

Claiming a balance due of	-	-	-	\$1,066 12
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This account was rendered March 22, 1878. On the twelfth of November preceding he had rendered a partial account, in which he charged sundry items of expense, amounting to

And for "professional services in Boston, Portland, Portsmouth, and New York, as charged to date, including	-	-	-	\$ 98 74
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minor expenses,"	-	-	-	-	401 26
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\$500 00

—crediting cash to the same amount, received in two payments of \$250, and in the letter accompanying this account said:

"I inclose a statement of my account to November 1st. The unsettled state of the large number of cases in question, requiring almost constant watching, attendance on motions, answering correspondence, and items of expenditure, prevents my sending any more satisfactory account at present."

The decree in the test case that the use of celluloid did not infringe the vulcanite patent was filed December 17, 1877, and on the same day, according to stipulation, a like decree was entered in all the other cases. The final decree dismissing the cases, with costs, was on the twenty-eighth of January, 1878.

Mr. Chandler resists this demand upon various grounds. The first position is that the docket fee is expressly given to the solicitor by sections 823 and 824 of the Revised Statutes of the United States, and that the costs for travel and attendance are allowances for his own travel and attendance. That costs for travel and attendance may be properly taxed to the prevailing party has been too well settled in this circuit to be now doubted. To whom these items belong is another question. They are not taxed as part of the compensation allowed by law to attorneys or solicitors, but are rather to be considered as taxed to the party. *Nichols v. Brunswick*, 3 Cliff. 89. The taxation is the same when no solicitor is employed, but the party appears for himself. Rev. St. §§ 823, 824, prescribe the amount to be taxed as compensation for attorneys, solicitors, and proctors, at the same time guarding against the implication that the fees so prescribed shall be taken as the just measure of compensation as between solicitor and client. It is urged that this statute determines and fixes by law the minimum of that compensation. But this construction assumes the purpose of the statute to be the regulation of charges between solicitor and client, rather than to secure uniformity in the taxation of costs, in the United States courts. Prior to the statute of 1853, February 26th, the taxation was controlled by no rule of general application. This act of February 26, 1853, substituted, in all the federal courts, for the state practice, its own provisions. Before its passage, the costs, though made to conform to the allowance for the same items in the courts of the respective states, were distinctly taxed and allowed "in favor of parties obtaining judgment." Act 1793, c. 20, § 4. That to secure this uniform rule was the object of the statute is plain, and there is no reason to conclude there was a further purpose to change the party in whose favor the allowance was made, and to take the costs from the party to the suit and give them to the attorney. "The bill of costs primarily belongs to the successful party. It is included in his judgment. It is not the attorney's, though he has a lien upon it." *Clay v. Moulton*, 70 Me. 315. "In strictness, all the items included in the bill of cost belong to the party." *Cooly v. Patterson*, 52 Me. 472.

A usage is claimed that docket fees, and fees allowed for travel and attendance, shall be taken and treated by the solicitor or attorney as his own. Such usage is testified to by so many gentlemen of the

highest character and extensive practice that there can be no doubt that the practice, in the districts where these suits were carried on, is very largely in conformity with it. But, on the other hand, witnesses of equal credit and opportunity to know have testified that they are not aware of any such invariable usage. That these are fewer in number than the others does not affect the result. *Scudder v. Bradbury*, 106 Mass. 422; *Porter v. Hills*, 114 Mass. 106. This usage, too, if it were fully proved, does not appear to prevail generally, but, so far as the evidence in this case shows, is confined to a few states. It is not shown to exist in the community where the plaintiff belongs. The only evidence on that point was in direct denial of such a usage there. Nor has it been shown, or even been attempted to be shown, that the plaintiff, its officers or agents, who employed Mr. Chandler, had any knowledge of such a usage in Massachusetts, New Hampshire, or Maine, the states in which the services were to be performed. Under this state of facts, the plaintiff cannot be held bound by any such usage as is invoked by the defendant. *Adams v. Insurance Co.*, 17 Fed. Rep. 630; *Marye v. Strouse*, 6 Sawy. 204; S. C. 5 Fed. Rep. 483; *Cobb v. Lime Rock Ins. Co.*, 58 Me. 326; *Dodge v. Favor*, 15 Gray, 82; *Stevens v. Reeves*, 9 Pick. 201.

But though the taxable costs, as such, neither belong primarily to the attorney, by force of any law, and have not been shown to be his by force of any usage that they shall be considered to belong to him, he is still entitled to reasonable compensation for his services. "He is entitled to a just and fair compensation for services rendered. It matters little whether the charge be a specific sum equivalent to the taxable bill of costs, less the witness fees, or the bill of costs specifically named. In either event, it represents the charge for services rendered. The reasonableness of the claim is to be determined by the tribunal to whose judgment the case is submitted." *Clay v. Moulton*, 70 Me. 316. "When the party employs an attorney to attend to the case for him, the party becomes indebted to the attorney for his services and disbursements in the suit; and to insure his pay the law gives the attorney, not any particular item of costs that may have accrued in the case, but a lien upon the whole bill of costs for what may be justly due him for such services and disbursements; and when his client prevails in the suit, we think the attorney may justly charge him, among other items, with the amount recovered for travel and attendance." *Cooly v. Patterson*, 52 Me. 472.

Mr. Chandler, by his employment, was required to keep a supervision of all suits, whether many or few, that might be commenced against dentists using celluloid. In fact, he became thus connected with 164 cases. Each was distinct from all the others. In each vigilance and care were required of him. Each imposed on him the duty of keeping watch of the movement of the opposing party, informing the leading solicitors of what was taking place, and answering the inquiries of the defendants, corresponding, filing papers, and

attending to the various small and constantly arising details in such business. In 124 of those cases costs were collected amounting to the large amount demanded in this action. But these cases must be looked at distributively, and not collectively, to determine the reasonable compensation of the solicitor. The amount is charged in gross to the Celluloid Company for services in the whole 164 cases, and is equivalent to \$36.64 for each case. The sum collected, including the two cash payments of \$250 each, and deducting the amount of expenditures, is equal to \$30.08 for services in each suit. The total charged, above the costs collected, would be \$9.84 for each case; and, if the taxable costs collected be assumed to be charged only in the 124 cases in which costs were recovered, they would then stand as contingent fees in prevailing defenses of \$39.83 per case, giving the solicitor for each case, where his client was successful, \$49.67, and in the unsuccessful cases but \$9.84; and the whole, with the exception of less than \$2 per case, drawn from the purse of the adverse party.

Whatever may be taken as the rule for distributing these costs, or the charge made, the compensation claimed cannot be considered unreasonable or excessive, and the plaintiff cannot recover anything in this action.

This conclusion obviates the need of considering the right of the plaintiff to maintain this action.

Judgment for defendant.

CENTRAL TRUST Co. and another v. WABASH, St. L. & P. Ry. Co. and others. (CITY OF ST. CHARLES, Intervenor.)¹

(Circuit Court, E. D. Missouri. March 25, 1886.)

1. TAXATION—ASSESSMENT OF RAILWAY PROPERTY—SECTION 1, ART. 10, CONST. MO.

The provisions of the act of the general assembly of Missouri, of July 30, 1877, and of the Revised Statutes of Missouri of 1879, (sections 6865-6900,) giving the state board of equalization exclusive power to assess railroad property, are not contrary to the provisions of section 1, art. 10, of the constitution of Missouri.

2. SAME.

Neither are said statutory provisions in conflict with that provision of the charter of the city of St. Charles which authorizes said city to levy and collect taxes "upon all real and personal estate, taxable by the laws of the state," within its limits.

3. SAME.

Under said statutes the state board of equalization has authority to decide that railway bridges within the city limits of St. Charles shall be assessed and taxed as part of the road-bed and superstructure.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

4. LAWS—CONFLICT BETWEEN, AND CITY CHARTERS.

Seemle, that where a city charter granted by an act of the general assembly of the state of Missouri conflicts with a law subsequently passed, as to assessment of property for taxation, the charter must be held to be superseded to the extent of any conflict that may exist.

In Equity. Exceptions to master's report.

This suit is to recover certain taxes, amounting to \$11,000, alleged to have been assessed and levied by the city of St. Charles, Missouri, under authority of its charter, upon the St. Charles bridge, for the years 1878 to 1884, inclusive.

The facts are substantially as follows: The St. Charles Bridge Company, a joint-stock corporation, organized under the general laws of Missouri, constructed the bridge in question in the year 1871. It was intended to be used as a railway bridge, and has never been used for anything else. It spans the Missouri river at St. Charles, and 2,308 feet of the bridge and its approaches are within the corporate limits of that city. The bridge forms a connecting link and component part of the line of railway now owned by the Wabash, St. Louis & Pacific Railway Company, extending from the city of St. Louis to Kansas City, in the state of Missouri. July 8, 1878, the St. Louis, Kansas City & Northern Railway Company, which had used said bridge ever since its completion under a lease, as a part of its railway, purchased the bridge, and continued to use it as before until it was succeeded in 1879 by the St. Louis, Kansas City & Northern Railway Company, which has used it as a part of its line of railway ever since. Prior to July 30, 1877, taxes were paid upon said bridge to the city of St. Charles, levied by the mayor and councilmen, under its charter and ordinances.

On July 30, 1877, the general assembly passed an act giving the state board of equalization exclusive power to assess railroad property, and since then the St. Charles bridge has been returned by its owners to that board as part of the road-bed and track of the St. Louis, Kansas City & Northern Railway, and its successor in title, the Wabash, St. Louis & Pacific Railway, for the years 1878 to 1884, inclusive; and the board has annually assessed the property as a part of the track of said railway companies for all the years above named, except the year 1884, for which the assessment had not been made at the time the intervenor's petition was filed. The city's part of said general tax upon said property for said years has been paid over to the respective treasurers of said city. The assessor of the city of St. Charles has, however, during all of said years, assessed that part of the St. Charles bridge located within the city limits separate from the railroad track upon it. It is not claimed that he had any authority for so doing except the provisions of the city charter and ordinances.

The question is as to how far the rights of the city under its charter have been affected by the acts of the general assembly.

The city of St. Charles was incorporated as a municipal corporation by the general assembly of the state by an act approved March 10, 1864, which act, and the several acts amendatory thereof, were reduced into one act by an act of the general assembly approved March 1, 1869. Said last-named act provided that (article 6, §§ 1, 2) "the mayor and councilmen shall have power, by ordinance, to levy and collect a general tax upon all real and personal estate taxable by the laws of the state within the city, not exceeding one per cent. upon the assessed value thereof," and, in addition thereto, "to levy a tax not exceeding one-half of one per cent. upon all taxable property within the city, to provide for a sinking fund."

The mayor and aldermen of the city passed an ordinance, approved November 1, 1877, which provided (section 1) that—

"For the support of the city government, the payment of the city debts, and improvement of the city, a tax shall be levied upon the following objects owned or employed within the city: *First.* Lands and lots, including the houses and all improvements thereon, whether completed or not. *Second.* Leasehold interests in houses, lands, or lots, for a term of ten years or more, as lands. * * *

"Sec. 4. That a general tax of one-half of one per cent. of the assessed value thereof shall be levied and collected on all property subject to taxation by the laws of the city, real, personal, and mixed.

"Sec. 5. That a special sinking-fund tax of one-half of one per cent. shall be levied and collected on all property subject to taxation under the laws of the city."

"Sec. 21. That real estate shall be assessed at the assessment which commenced on the first day of August, 1876, and shall only be required to be assessed every two years thereafter."

"Sec. 69. That this ordinance is intended to be in compliance with, and in conformity to, the act of the general assembly of the state of Missouri entitled 'An act concerning the assessment and collection of the revenue,' and all the sections, and parts of sections, of the said act, so far as applicable, are hereby incorporated into, and made a part of, this ordinance, and the same shall be recognized and considered as controlling authority by the city collector, as far as practicable."

The mayor and aldermen of the city of St. Charles, on July 31, 1880, passed an ordinance entitled "An ordinance to amend 'An ordinance in relation to revenue,'" approved November 1, 1877, repealing all ordinances and parts of ordinances in conflict therewith, providing (section 3) that "there shall be annually levied and collected on all property in the city, real, personal, and mixed, subject to taxation, a tax of fifty cents on the hundred dollars of valuation, for general purposes, and a sinking-fund tax in addition thereto for the payment of interest on the bonded indebtedness of the city," etc.

The first section of this ordinance was as follows: "For the support of the city of St. Charles, the payment of the city debts, and interest thereon, and for the improvement of the city, a tax shall be levied annually upon all the property within the city, real and personal, taxable as hereinafter provided;" and by an ordinance of May 28, 1881, this section was amended so as to read: "For the support

of the city of St. Charles, the payment of the city debt and interest thereon, and for the improvement of the city, a tax shall be levied annually upon all the property within the city, real and personal, taxable by the laws of the state of Missouri."

In the year 1871 the general assembly inaugurated a general system for valuation, and the act above referred to, giving the state board of equalization power to assess railroad property, was passed in 1877. The act of 1877 has been incorporated in the Revised Statutes of Missouri of 1879, which (sections 6865-6900) prescribe the manner in which taxes shall be levied on all property in the state owned, hired, or leased by any railroad company, for state, county, or other municipal or local purposes; require all railroad companies to furnish annually a sworn statement to the state auditor, giving in detail the length of the road, of double or side tracks, with depots, water-tanks, and turn-tables, and the length of such road, double or side tracks in each county, municipal township, incorporated city, town, or village through or in which it is located in this state; * * * and at the same time to furnish to the clerk of the county court of each and every county in the state in which said road may be located a duplicate statement of its property in such county; shall examine the statement so made, and determine the correctness as to description of property and valuation thereof, and forward a certificate of their action to the state auditor; and provide how any ascertained errors in the statements may be corrected; direct that the state auditor shall lay before the state board of assessment and equalization the returns made to him by the railroad companies and county clerks; constitute the governor, secretary of state, state auditor, state treasurer, and attorney general of the state the board of assessment and equalization; authorize such board to assess, adjust, and equalize the property of the railroad companies of the state included in such returns, with power to increase or reduce the aggregate valuations made by the railroad companies or the county courts in their respective returns, and to assess, adjust, and equalize any other property belonging to any railroad company in the state of the character above stated, as to which no returns have been made, but which may be otherwise known to them; and shall apportion the aggregate value of all such property to each county, municipal township, city, or incorporated town according to the ratio which the number of miles of such road completed in such county, municipal township, city, or incorporated town shall bear to the whole length of the road in the state.

The master, Mr. E. T. ALLEN, from whose able and exhaustive report this statement has been to a great extent copied, found and reported that "if any conflict exists between the provisions of the laws of the state regarding valuation of railroad property for taxation and the charter of the city of St. Charles, the charter must be held to be superseded to the extent of any such conflict, (*State v. Severance*, 55

Mo. 378;)" but that the authority given by the charter of the city of St. Charles to its mayor and councilmen to levy and collect taxes "upon all real and personal estate taxable by the laws of the state within the city," is not taken away by the statutory provisions as to its valuation; that the legislation in reference to the assessment of railroad property is not contrary to the provision of section 1, art. 10, of the Missouri constitution of 1875; and that "the question whether or not the St. Charles bridge property should be included as a part of the road-bed and superstructure of the railway owning it, or assessed and taxed as a separate property, was one exclusively within the province of the state board of equalization to determine;" "and that inasmuch as that board has passed upon that question, for the years named, adversely to the contention of the city of St. Charles, the city of St. Charles is bound by that determination."

Dyer, Lee & Ellis and F. W. Hinman, for intervenor.

H. S. Priest and George S. Grover, for receiver.

TREAT, J., (*orally*.) In the intervening petition of the city of St. Charles in the *Wabash Case* I have gone over the subject, and the exceptions to the master's report will be overruled. If I talked an hour I could add nothing to the exhaustive and analytical opinion given by the master in this case. He has gone through the whole subject in connection with the constitution and laws in great detail, and very accurately and correctly. The court, not only adopts his report in that matter, but his analysis and reasoning in regard to the case. The exceptions are overruled, and report confirmed.

APOLLINARIS Co., Limited, v. SCHERER.

(*Circuit Court, S. D. New York. March 16, 1886.*)

TRADE-MARK—INFRINGEMENT—CONTRACT FOR EXCLUSIVE RIGHT TO SELL "HUNYADI JANOS" WATER—PURCHASE FROM PARTIES TO WHOM OWNER RIGHTFULLY SOLD—RESELLING.

The owner of a spring of mineral water in Hungary entered into a contract with complainant giving him the exclusive right to export and sell the water under its name of "Hunyadi Janos," which he had adopted as a trade-mark, in Great Britain and America. Defendant applied to the owner to purchase the bottled water, but was refused, and purchased it from those to whom it had been sold in Germany, and sold it in the United States in bottles with the same label as that used by complainant, except that defendant's bottles, like all those sold by the owner, were stamped with the words, "CAUTION. This bottle is not intended for export, and if exported for sale in * * * America * * * the public is cautioned against purchasing it," while complainant's bottles were stamped "Sole exporters." *Held*, that complainant was not entitled to an injunction to restrain defendant from selling the water.

In Equity.

Roscoe Conkling and Henry Melville, for complainant.

Wayne MacVeagh and Emile Beneville, for defendant.

WALLACE, J. The complainant has applied for an injunction *pendente lite* to restrain the defendant from importing into the United States or selling here any water under the name or designation "Hunyadi Janos," or offering to sell any water in bottles with that name upon them, or with labels like those adopted and used by the complainant to designate and distinguish the water from other mineral waters. The defendant is importing and selling here the water of a certain mineral spring of Hungary owned by one Andreas Saxlehner. The waters are known as "Hunyadi Janos," the spring having been christened by that name by Saxlehner, and the name as applied to the water having been adopted by him as a trade-mark. Prior to the time of the acts complained of Saxlehner transferred to the complainant the sole right to export the waters from Hungary to Great Britain and America, and to sell them in these countries and to use the trade-mark. For the more effectual protection of their respective rights Saxlehner and the complainant adopted labels to be affixed to the bottles of water to be sold by each bearing the name "Hunyadi Janos" and other distinguishing devices. The labels used by Saxlehner contained the following printed notice:

"CAUTION. This bottle is not intended for export, and if exported for sale in Great Britain, her colonies, America, or other transmarine places, the public is cautioned against purchasing it. ANDREAS SAXLEHNER."

The labels used by the complainant contained in the place of this notice the following:

"Sole exporters. The Apollinaris Company, Limited, London."

Thereafter all water sold by Saxlehner to purchasers in Germany and other parts of continental Europe was sold in bottles with the label which had been adopted for him, and all the water sold by the complainant in Great Britain and the United States was sold in bottles with the label adopted for its use.

The complainant established an agency for the sale of the water in this country, but, as it now asserts, is unable to maintain its own prices for the article because the defendant purchases the water in Germany from persons to whom it has been sold by Saxlehner, imports it, and sells it here at lower prices. It is shown that the defendant purchases the water in bottles under the label adopted by Saxlehner containing the cautionary notice, and that he does this after having applied to Saxlehner to sell him the water and been refused and informed by Saxlehner of the complainant's rights.

The bill of complaint proceeds in part upon the theory that the defendant is infringing the complainant's trade-mark in the name and label applied to the water, but all the averments in this behalf may be disregarded as irrelevant to the real question in the case. No doubt is entertained that the name when applied to the water is a valid trade-mark, and that the complainant should be protected against the unauthorized use of the trade-mark by another. The complain-

ant would be entitled to this protection entirely irrespective of the registration of its trade-mark in the patent-office. The same observations apply to the use of the label. The complainant has a common-law right to the name and the label as a trade-mark by which its mineral waters are identified; and as the necessary diversity of citizenship exists between the parties to confer jurisdiction upon this court, the only effect of registration is to afford and perpetuate the evidence of the complainant's title. But the defendant is selling the genuine water, and therefore the trade-mark is not infringed. There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked.

The real question in the case is whether the defendant is unlawfully interfering with any exclusive right of the complainant to control the sale of the water in the territory ceded to the complainant for that purpose by Saxlehner. It is manifest that the acts of the defendant tend to deprive the complainant of the substantial advantages which it expected to obtain from the privilege transferred to it by Saxlehner. It can no longer maintain its own prices for the mineral water, or hold out the inducements it formerly could to the agents it has selected to introduce the article to the patronage of the public, and build up a trade. It can no longer protect itself as efficiently against the chances of a spurious article being palmed off upon the public as its own. It is therefore measurably deprived by the acts of the defendant of the profits and benefits which it contemplated when it purchased from Saxlehner the exclusive right of importing the water into this country and selling it here. If the complainant could acquire an exclusive right to sell the water here the case would be plain. If it could not, it still remains to consider whether the defendant has violated any duty which the law recognizes in his relations to the transaction. There would seem to be no doubt that the agreement between Saxlehner and the complainant was a valid one. He had the right to dispose of his property in the product of his spring as he saw fit, and it is not apparent how the transfer of a part of his exclusive right to vend the water, by which a territorial division in its enjoyment was created, can be deemed obnoxious to any principle of public policy as tending to create a monopoly or an unlawful restraint of trade. If Saxlehner were now endeavoring to compete with the complainant in the sale of the water in the ceded territory, his conduct would furnish a ground for equitable jurisdiction and the remedy of an injunction because of the inadequacy of a remedy at law. Bisp. Eq. 463. It is equally clear that if the defendant were co-

operating with Saxlehner collusively to violate the complainant's right to the exclusive sale of the water he also would be restrained. In such a case the foundation of equitable redress would be the breach of covenant on the part of Saxlehner, and the defendant when acting in aid would be identified with Saxlehner and amenable to the remedy as though he were Saxlehner himself. But it is important to bear in mind that the case would be one for equitable cognizance, and the remedy of an injunction merely upon the ground that the complainant's damages arising from the breach of covenant could not be reparably redressed at law.

It was not possible by any contract or grant between Saxlehner and the complainant to create a territorial title to the products of the spring; no such title is known to the law of personal property. No analogy can be drawn from the law of patents for inventions, because the title to this species of property is purely statutory; and it is by force of arbitrary law alone that the title in the incorporeal property can be subdivided into territorial parts. The decisions which have been relied on in argument as sustaining the right of the owner of a patent to prevent a sale or use of the patented thing outside of the territorial limits for which a license has been granted, although the license authorized a sale and the sale was made within the territorial limits of the license, have therefore no application to the present case. The rights of the complainant rest purely in covenant. If Saxlehner himself should sell the water here the purchaser would acquire title to the article with all the rights of a proprietor to use it or to do with it as he might see fit. Suppose the purchaser should be fully aware at the time of buying that Saxlehner had covenanted with the complainant that the latter alone should have the privilege of selling the water here, could it be seriously questioned that the purchaser would nevertheless acquire a perfect title? Although the defendant was fully aware when he bought the water which he has imported from those to whom Saxlehner had sold it of the terms of the agreement between Saxlehner and the complainant, that circumstance does not help the complainant's case. There was no breach of covenant on the part of Saxlehner; on the contrary, he did all that was in his power to carry out the agreement between himself and the complainant. The defendant did not expressly or impliedly assume not to sell the water within the territory ceded to the complainant; on the contrary, he repudiated any recognition of such an obligation. The insuperable difficulty in the way of the complainant is that any purchaser of the water, wherever he purchases it, acquires a valid title to treat it as his own property.

Upon first impression it would seem that the defendant cannot be justified in a course of conduct which is calculated if not deliberately prompted by the design to deprive the complainant of the benefit of its contract with Saxlehner, and that there must be some principle of equity which can be invoked to prevent him from doing that which

Saxlehner himself would not be permitted to do. The interposition of a court of equity is frequently invoked and always successfully to restrain unlawful competition in trade. All practices between rivals in business which tend to engender unfair competition are odious and will be suppressed by injunction. *Croft v. Day*, 7 Beav. 84; *Harper v. Pearson*, 3 Law T. (N. S.) 547; *Stevens v. Paine*, 18 Law T. (N. S.) 600; *Glenny v. Smith*, 11 Jur. (N. S.) 964; *Muck v. Petter*, 41 Law J. Ch. 781; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Glen & H. Manuf'g Co. v. Hall*, 61 N. Y. 226; *Goodyear Rubber Co. v. Goodyear's Manuf'g Co.*, 21 Fed. Rep. 276; *Genin v. Chadsey*, 2 Brewst. 330; *Avery v. Meikle*, 17 West. Jur. 292; *Bell v. Locke*, 8 Paige, 75. But the adjudications which illustrate the principle rest upon the ground that a merchant or trader is entitled to protection only against dishonest or perfidious rivalry in his business. He will be protected against the fraudulent or deceitful simulations by a competitor of tokens which tend to confuse the identity or business of the one with the other, and against the false representation of facts which tend to mislead the public and divert custom from the one to the other. Anything short of this, however, is lawful competition. Accordingly the courts will not attempt to prevent the sending of circulars or advertisements by one to the customers of a competitor in business although designed to alienate patronage, if they contain no deceitful or misleading statements.

The law does not deal with motives which are not accompanied by a wrongful overt act. If the defendant is legally justified in buying where he can and selling as he chooses, it is not material whether he is actuated by a desire to annoy the complainant or to promote his own pecuniary interests.

The complainant is without remedy and the motion for an injunction must be denied.

ESTES and others v. LESLIE and others.

(*Circuit Court, S. D. New York.* April 8, 1886.)

TRADE NAME—CHATTERBOX—INFRINGEMENT.

The use of the word "Chatterbox," in connection with the same method of selection and illustration of stories, form of binding, and vignette, by defendants, *held*, an infringement of complainants' right in the name.

In Equity.

John L. S. Roberts, for orators.

Charles E. Rushmore, for defendants.

WHEELER, J. This case is similar to *Estes v. Williams*, 21 Fed. Rep. 189, in respect to the right of the orators to the exclusive use

of the name "Chatterbox" upon their series of juvenile publications in this country. No occasion appears for repeating what was there said. The question of laches is more relied upon here as a defense than it was there. There is a question as to the effect of a decree in favor of the defendants against the orators, entered by consent in the court of common pleas of New York in 1881; and a question whether the use of that name by the defendants upon their publication amounts to any misrepresentation as to their source.

Mr. Johnston, from whom the orators derive their right, appears to have had the exclusive use of this name for his series of publications, both in England and this country, without interference, from 1866 to 1876, and his works to have become well known by that name in both countries. By that means he had acquired a clear right to that name for the admittance of his works among customers. So far as is shown, he vindicated this right as often as it was invaded to his knowledge until the time when he conveyed it to the orators in 1880. Since then they have not, for any length of time, abandoned it, but have continually asserted it in one way or another, although not against all trespassers at once. No right as against these defendants appears to have been lost in this manner. *Collins Co. v. Ames*, 20 Blatchf. 542; S. C. 18 Fed. Rep. 561.

The operative part of the decree of the court of common pleas restrained the orators from selling any publication called the "Chatterbox" or "Frank Leslie's Chatterbox," with the name "Frank Leslie," or the address "Frank Leslie's Publishing House, 53, 55, and 57 Park place, New York," thereon. This did not extend to the name "Chatterbox," and no right to its use was decreed to either party, or affected by the decree in any manner.

Whether the use which the defendants make of the name is calculated to put their publications in the place which those of the orators would otherwise take is principally a question of fact, and is the most important one open in this case. The publications of Johnston were composed of selections of stories, sketches, and poems, with pictorial illustrations intended for, and interesting to, the young; printed with a head-line, "Chatterbox," on each page; bound in square form, in illuminated boards, with vignette slightly varying in style from one number to another, and the name "Chatterbox" prominently on the front, and with a plain cloth back. The selections had been made with such care and skill, and the illustrations and style of binding made so attractive, that they had acquired great popularity, and found large sales, as well in this country as elsewhere. The same method of selection and illustration, square form, style of binding, and of vignette, as well as name on the cover, have been taken by the defendants. The name is the only thing in question in this case, but the adoption of so many other features tends to show the intent with which the name is used. All these things together lead plainly to the conclusion that the name has been appro-

priated to gain an advantage from the reputation and popularity which Johnston's work had acquired under it, and that this appropriation of it is calculated to make the works of the defendants pass for his to some extent. It is true that the name "Frank Leslie" is added, so that the title is "Frank Leslie's Chatterbox," and the address of the publishing house is put on. This appears to be done, however, for the purpose of adding the reputation of Frank Leslie and of that publishing house to that of the Chatterbox, rather than for that of building up a new reputation under that name. If nothing had been wanted of the popularity which had been acquired under it, and which it stood for, it could have been left, and another name taken to build up. The defendants do not copy the orators' publications, but imitate them, and apply the name of the orators' publications to their imitations.

Let a decree be entered for the orators for an injunction and an account, with costs.

ATLANTIC MILLING Co. v. ROWLAND and others.

(*Circuit Court, S. D. New York. February, 1886.*)

TRADE-MARK—INFRINGEMENT—DAMAGES—PROFITS.

Where a party has made profits by the sale of goods in violation of the rights of another in a trade-mark, the owner of the trade-mark is entitled to them, whether the same profits would have been made by him or not, and not to any more if they would, for the same profit could not be made by both.

In Equity.

Antonio Knauth, for orator.

Fred'k P. Foster, for defendants.

WHEELER, J. The final decree establishes the right of the orator to the use of the word "Champion" as a trade-mark for flour; that the defendants have infringed upon that right; and that the orator is entitled to recover of them the profits to the defendants, and damages to the orator, due to the infringement. The master has reported that the defendants have used the trade-mark in the sale of 900 barrels of flour, and have made a profit of 25 cents per barrel through that infringement, amounting to \$225; and that the orator has suffered damages to that amount thereby. The defendants except to this finding only. The principal question is whether it is warranted by the evidence. The evidence tended to show that flour of the orator's having that mark was in the same market, that it would bring 25 cents more per barrel on account of that mark, and that the defendants used the mark in making the sales. The defendants' evidence tended to show that the flour would not bring any more on account of the

mark, and that they lost, on all the lots making up the 900 barrels, except one, \$43, and on that one made only \$7.50. All questions as to the weight of conflicting evidence were for the master. The defendants might get 25 cents per barrel more on account of the trade-mark, and still lose on the whole transaction. The profits due to the trade-mark only, and not the profits of the whole business, were the subject of inquiry. *Garretson v. Clark*, 15 Blatchf. 70; S. C. 111 U. S. 120, and 4 Sup. Ct. Rep. 291. The general loss would be less on account of what the trade-mark brought more.

It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both. But the master seems to have inferred that they would, and therefore to have found that the orator was damaged by the loss of profits to the same extent that the defendants saved by them. The fact that the flour of the orators bearing this mark was in the same market would seem to be sufficient to warrant this finding. *Faber v. Hovey*, 1 Wkly. Dig. 529; S. C. 73 N. Y. 592.

Exceptions overruled, report accepted and confirmed, and decree to be entered accordingly.

CAFFERY v. JOHN HANCOCK MUT. LIFE INS. CO.

(Circuit Court, E. D. Michigan. March 15, 1886.)

1. LIFE INSURANCE—WAIVER OF STATUTORY PROVISION.

An act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding." *Held*, that this act might be waived by the express agreement of the parties, by the substitution of a non-forfeitable policy of a different character.

2. SAME—BENEFICIARY BOUND BY ORIGINAL CONTRACT.

The beneficiary of a policy is bound by all the terms of the original contract entered into between the insured and the company.

This is an action upon a policy of life insurance for \$1,000. The facts were all stipulated, and were substantially as follows:

(1) The defendant is a corporation, organized and existing under the laws of the state of Massachusetts prior to the dates of any of the statutes of the state hereinafter mentioned.

(2) On the fifteenth day of November, 1880, one John F. Mills, of Michigan, made his written and printed application to the defendant for insurance on his life for \$1,000, for the term of 20-year endowment, and in said application agreed as follows, to-wit:

"In consideration of the agreement of said company that the policy to be issued on this application, if accepted, shall not be forfeited for non-payment of any premium, but in case of failure to pay any premium shall become a paid-up policy for an amount proportional to the premium paid, it is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of chapter 186 of the Laws of 1861 of the commonwealth of Massachusetts, if it should be held that said chapter applies thereto; and agrees that said chapter shall constitute no part of said policy, and will accept said provision for a paid-up policy in lieu of the provisions of said chapter."

(3) After the execution and delivery of said application by said Mills to the defendant, on December 4, 1880, it issued to him its policy of insurance, whereby, in consideration of the premium of \$47.98, to be paid on or before December 4th, in every year, it promised to pay \$1,000 to said Mills 20 years from date, or, in case of his prior decease, to his sister, the plaintiff, 60 days after due notice and proof of his death, deducting the premium, if any, for the balance of the policy year. It was further provided in said policy as follows:

"After one or more premiums shall have been paid, this policy shall not become forfeited or void by the non-payment of any subsequent premium, but shall remain in force for an amount *pro rata* to the number of premiums paid, to-wit, for one-twentieth of the amount insured for each and every premium paid. This contract is made and to be performed in the commonwealth of Massachusetts."

(4) After the payment of the first premium, and the failure to pay the second, and on the twenty-seventh day of October, A. D. 1882, the insured died, and due notice and proof was made. The policy was then in force to the full amount if chapter 186 hereinafter mentioned applied thereto. Thereupon the plaintiff claimed the application of the statute of 1861, c. 186, and demanded the full amount of insurance, \$1,000; but the defendant contended that chapter 186 of the Laws of 1861 did not apply to said policy; or, if it did, that by reason of the waiver of the statute, and the agreement by the insured to accept the provision made for a paid-up policy for an amount ratably proportional to the number of premiums paid, to-wit, one-twentieth of \$1,000 for each premium paid, the plaintiff was entitled to receive \$50, which it offered to pay the plaintiff.

(5) Judgment is to be rendered for the plaintiff for \$50, without costs or interest, in case the court sustains the contention of the defendant; and for \$1,000, and interest from December 27, 1882, and costs, in case the court sustains the contention of the plaintiff.

A jury was waived.

Chas. A. Kent, for plaintiff.

Alfred Russell, for defendant.

BROWN, J. The question is as to the applicability of the statute, and as to whether it was waived by the provisions of the policy. The statute of Massachusetts, passed in 1861, to which this policy was

made subject, provided that no policy of insurance hereafter issued by any company chartered by the authority of the commonwealth shall become void or be forfeited by the non-payment of the premium thereon, etc. There follows a provision that the first premium shall constitute what is called a temporary insurance; and if the statute applied to the policy, the plaintiff, as appears by the stipulation, was insured to the amount of \$1,000, the full amount of the policy, for some two years after the payment of the first premium. When he died he would have been entitled to receive the full amount of the policy, although after the expiration of what is called the temporary insurance the policy would become absolutely void. The second section of the chapter provides that if the death of the party occur within the term of the temporary insurance covered by the value of the policy, if no condition shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as though there had been no lapse of the premium, "anything in the policy to the contrary notwithstanding."

This policy, instead of being issued in the ordinary form, provided specially that upon the payment of the premium the policy should be non-forfeitable, and should stand good for that portion of the sum insured which the premium represented. The policy having been a 20-year endowment policy, and the first premium having been paid, it continued good for \$50, or one-twentieth of the amount insured.

The plaintiff insists that this provision of the statute could not be waived, and that as the period of the temporary insurance provided by it had not expired, she is entitled to recover the entire amount of her policy. The vital question, then, is whether it was competent for the parties to waive the provision of the statute in express terms. We have no doubt that the statute was intended to apply to all policies, "anything to the contrary notwithstanding," as the statute expressly says; and that if the policy had been an ordinary one the party would have been entitled to the whole sum insured. It is questionable whether the policy actually issued was not a more beneficial one for the insured than the one provided for by the statute; because if the temporary insurance had expired, the policy, by the statute, became void, and nothing could be recovered upon it, although the first premium had been paid; but under the stipulation in the policy it did not become void, but only became a policy for the *pro rata* amount of the sum insured; that is, in this case, for one-twentieth. In this particular case it operates unfortunately for the insured, because having died while the temporary insurance was still in force he would, under the statute, be entitled to the entire sum insured, whereas under this policy, as already stated, he would be only entitled to one-twentieth of this amount.

The question, then, is whether it was competent for the parties to waive the provisions of the statute. It is objected by the plaintiff that the statute must apply, *first*, because the pleadings set up no

such agreement, and hence none is admissible. In this connection she relies upon the seventeenth rule of the circuit court, which provides that "in case the company or person issuing such policy shall rely, in whole or in part, upon the failure of the plaintiff to perform or make good any promise, representation, or warranty not contained in such policy, but set forth in any other paper or instrument in the hands of said insurer, the notice under the general issue shall declare the same, and indicate the breach relied on." We are clearly of the opinion this rule does not apply to this case, as the defendant offers the application, not for the purpose of showing that the plaintiff has been guilty of a breach of warranty, but to prove what the contract actually was. In such case the general rule applies that all papers executed at or about the same time are admissible to show the whole agreement between the parties. The parties are not limited to any one agreement under the rule, but all contemporary documents may be admitted to show the entire agreement.

Second. That the application in question is no part of the contract sued upon, as it is in no way referred to in the policy. This objection is covered by the remark already made that all contemporaneous papers are admissible to show the contract between the parties.

Third. That it cannot bind Mrs. Caffery, who never heard of it, and whose rights were fixed at the time the policy issued. We understand the rule to be that when the policy has once issued and taken effect, no agreement can be entered into between the insurance company and the person whose life is insured to the detriment of the beneficiary under the policy, but that the beneficiary is bound by the contract entered into between the assured and the company. While she cannot be prejudiced by subsequent agreements, she is bound by whatever covenant or agreement was entered into at the time the policy was issued.

Fourth. The law was for the benefit of the insured, and by its very terms the insured could not waive this benefit. The insurer must pay the loss if the policy was in force as provided by the statute, anything in the policy to the contrary notwithstanding. We think, however, that a party may waive the benefit of this statute. The words "anything in the policy to the contrary notwithstanding," in our opinion, were intended to apply to the ordinary forms of policies, which provide that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties.

This question came before Mr. Justice CLIFFORD in the case of *Desmazes v. Mutual Ben. Life Ins. Co.*, 7 Ins. Law J. 926. Desmazes, the husband of the plaintiff, died in 1876, after payment of the first premium and part of the second, and due notice and proof

of his death were given by the plaintiff to the defendant. No further payment of premium was made by the plaintiff. Except paying the premium, all conditions of the policy were fulfilled by the plaintiff. The court said:

"The parties agree that if the court shall hold that the Massachusetts statute of 1861, c. 186, applies to the contract made between the plaintiff and the defendants, then judgment shall be rendered in favor of the plaintiff for the sum of \$925, with interest; otherwise the judgment shall be for the plaintiff in the sum of \$85.98, with interest from the same date. * * * Nothing is contained in the statute to indicate that the legislature intended to withdraw the clear right which the insured had, outside the statute, to waive the non-forfeiture provision if the other party consented, and to accept a different stipulation, of a more favorable character, in lieu of the same. * * * By the express terms of the contract the insured was at liberty to omit paying the premiums at the times and place mentioned in the policy, and in that event the policy did not become forfeited or void, but became a paid-up policy for the amount, proportioned to the premiums previously paid. Fifty dollars it is stipulated shall be paid in that event for every annual premium previously paid in fulfillment of the contract between the parties, which, as the plaintiff contends, tends strongly to show that the policy did not become forfeited, and the case does not fall within the said Massachusetts statute. * * * Cases often arise where a party is at liberty to waive statutory provisions in his favor, and Mr. Sedgwick lays it down, as a general rule, that where no principle of public policy is violated, parties may waive the provisions of a statute which, if fulfilled, would operate in their favor, and that proposition is fully sustained by many other authorities. * * * When the parties undertake in the policy itself to declare the meaning and effect to be given to its stipulations, they have a right to do so, except in cases where there is some provision in the statute to indicate an intention on the part of the legislature to control the action of the parties in that respect. There is nothing of the kind contained in the original act referred to, as it is plain that its terms do not apply to any other than Massachusetts corporations."

The court held that the provisions of the statute might be waived.

We think it a strong authority for the proposition contended for, although the case went off upon the ground that the act only applied to Massachusetts corporations.

The case of *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush, 312, also holds that the statute providing that "all statements and descriptions in any application for the policy of insurance shall be deemed and held representations and not warranties," does not prevent parties from contracting that such statements and descriptions shall be considered part of the contract, and warranties by the assured, and that any false representations by the assured of the condition, situation, or occupation of the property shall render the policy void. The case holds, substantially, that a statutory provision of that kind may be waived. That this was also the construction given to the statute by the Massachusetts legislature is evident from the subsequent Acts of 1881, c. 63, § 1, and 1882, c. 119, § 161, in both of which it was expressly provided that any waiver by the assured of the benefits of the act should be void. If the legislature had considered that the provisions of the prior act could not be waived, this clause would be entirely nugatory.

It is further claimed by the plaintiff that the letter of the state agent to the assured estops the company from disputing the fact that the policy had not lapsed. But the policy expressly provides that no person except the president or secretary is authorized to make or waive contracts. The agent had no authority to put a construction upon this contract different from that which the law puts upon it.

Upon the whole, we have come to the conclusion that the plaintiff is entitled to a judgment for \$50, without costs, and as there was no tender made of the amount, no costs can be awarded to the defendant.

CROSSLEY v. CONNECTICUT FIRE INS. CO.

(Circuit Court, D. Massachusetts, April 6, 1886.)

FIRE INSURANCE—POLICY—PROVISION FOR ARBITRATION—CONDITION PRECEDENT.

A provision in a policy of fire insurance that in case any difference of opinion shall arise as to the amount of loss it shall be referred to arbitrators to be chosen as therein directed is not a condition precedent to a recovery for a loss, or to any proof on the trial of the amount of the loss.¹

At Law.

Gaston & Whitney, A. French, and G. F. Williams, for plaintiff.

J. D. Bryant and W. G. Russell, for defendants.

CARPENTER, J. This is an action at law on a policy of fire insurance. In advance of the trial, and from considerations of convenience, counsel have been heard to argue certain questions which will arise on the trial, in order that they may be provisionally determined. The same questions will also arise in the case of *Reed v. Fire Ins. Co. of Philadelphia*, and counsel therein have also been heard to argue those questions. The policies in question contain the following provisions:

"In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable or replace the property," etc. "In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen: provided, that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties."

At the trial of these causes evidence will be offered tending to show the amount of loss under the policy, but such evidence so offered will

¹See note at end of case.

not consist in any part of the award of referees appointed under the provisions of the clause last quoted. To the introduction of evidence so offered the defendants will object on the ground that the agreement for reference contained in the policy is to be construed to make the award of referees a condition precedent to any proof of amount of loss, or to make it the sole evidence as to such amount. When the testimony shall be closed, the defendants will pray a ruling that the verdict shall be for the defendants on the ground that the effect of the agreement for reference is to make such a reference a condition precedent to the right of the insured to recover.

Upon these two motions a vital question will be whether the agreement for reference is, on the one hand, a collateral contract, or, on the other hand, is expressly or by implication a condition precedent to recovery or to any proof of the amount of the loss. Upon examination of authorities, I am of opinion that the agreement is a collateral contract only. The questions which I have stated, as well as several other questions which in different views of the case might be material, have been argued very fully, and with great skill and learning, and abundant citation of authorities. The cases, however, upon which counsel on both sides mainly rely are but few in number.

The defendants refer to *Scott v. Avery*, 5 H. L. Cas. 811. The agreement in that case was "that the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before; which can only be claimed according to the customary mode of payment in use by the society; and if a difference shall arise between the committee and any suffering member relative to settling any loss or damage, * * * in such case the member dissatisfied shall select one arbitrator, * * * which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved upon oath by the secretary." The defendants also refer to *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250. In that case the contract was that "in case of an enlargement of the said canal the said president, managers, and company, and their successors and assigns, may also charge and collect an additional toll on coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of such enlargement in the manner following, viz.," etc. In these two cases, therefore, it appears that the contract expressly was to pay such a sum as should be fixed by arbitration according to a prescribed plan.

The defendants claim, however, that the agreement here is made a condition precedent by a necessary implication. Against this view the plaintiffs cite, among other cases, *Dawson v. Fitzgerald*, L. R. 1

Exch. Div. 257; *Schollenberger v. Phoenix Ins. Co.*, 7 Ins. Law J. 697; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Clement v. British America Assur. Co.*, (Sup. Ct. Mass.) 5 N. E. Rep. 847. I therefore decide that should the questions to which reference has been made be raised before me in a trial of these cases with a jury, I should overrule the objection of the defendants, and permit the evidence of amount of loss to go to the jury; and I should overrule the request of the respondents for an instruction to the jury that the plaintiff is not entitled to recover.

NOTE.

It is said in *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347, that the conditions in a policy of insurance requiring preliminary proofs, and a reference to arbitration in case of difference, are conditions precedent to a suit upon the policy.

It was held by the supreme court of Iowa in *Gere v. Council Bluffs Fire Ins. Co.*, 23 N. W. Rep. 137, that where a fire insurance policy provides that in case differences shall arise as to the amount of loss the subject shall be submitted to arbitration on the request of either party, and the award made in writing shall be binding as to the amount of loss or damage, it does not render an arbitration a condition precedent to the right of the insured to sue to recover a loss, but is nothing more than a mode of providing what should be deemed conclusive evidence of one of the facts.

A fire insurance policy provided for arbitration in case of loss. Through the failure and refusal of defendant to go on with the arbitration agreed upon it became ineffectual, and in the mean time, partly under orders of the city, the *debris* was removed. Defendant then requested plaintiff to submit to a second arbitration, which he refused to do, and brought this action. Held, that plaintiff having once consented to arbitrate, if the arbitration failed and came to an end from the fault of the defendants, the arbitration clause could not stand in the way of the action. *Uhrig v. Williamsburg City Fire Ins. Co.*, (N. Y.) 4 N. E. Rep. 745.

It is not infrequently provided in policies of insurance that any dispute arising under the policy shall be referred to arbitrators. Such agreements to arbitrate do not oust the courts of their jurisdiction. *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Kill v. Hollister*, 1 Wils. 129; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 596.

Where the underwriters refused to pay the loss of the assured, his right of action has been held immediately to accrue, although there was a clause in the policy that payment was not to be made until 90 days after proof and adjustment of the loss, and that, in case of dispute, the same might be settled by arbitrators. *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408.

Under such a provision an action may be sustained without any offer to refer. *Robinson v. Georges Ins. Co.*, 17 Me. 131.

But if there be a reference depending, or made and determined, it might be a bar. *Kill v. Hollister*, 1 Wils. 129.

In *Avery v. Scott*, 8 Welsb., H. & G. 497, it was decided that, although an agreement which ousts the courts of their jurisdiction is illegal and void, yet an agreement in a policy of insurance as to arbitration was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or arbitrators.

In *Goldstone v. Osborn*, 2 Car. & P. 550, it was held that the insured might maintain an action on such a policy, notwithstanding the condition, when it appeared that the insurers denied the general right of the insured to recover, and did not merely question the amount of damage.

So he may, if the insurance company waive the right to a submission to arbitration, as by taking possession and repairing the thing insured. *Cobb v. New England M. Ins. Co.*, 6 Gray, 193.

The effect of an agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court. See *Mitchell v. Harris*, 2 Ves. Jr. 129, and *Street v. Rigby*, 6 Ves. Jr. 814.

A simple agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration will not bar a suit at law by either party upon the contract before an offer to arbitrate; but when the contract stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or this may be inferred upon construction, no suit can be maintained unless the plaintiff made all reasonable effort to comply with the condition. *Perkins v. United States Electric Light Co.*, 16 Fed. Rep. 513.

It is said in *Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co.*, (Cal.) 5 Pac. Rep. 232, that courts are not deprived of their jurisdiction because of a general provision in an agreement that all disputes which may arise in the execution shall be decided by arbitrators, but that the parties may agree upon some method to liquidate damages which in their nature are unliquidated; and until such method has been pursued, or some excuse for not doing so proven, no recovery can be had.

A provision in a contract whereby all disputes between the parties are to be submitted to arbitration before being made the subject of litigation in the courts is not binding upon the parties when the controversy arises out of the non-payment of a sum of money stipulated in the contract to be paid. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, (Nev.) 7 Pac. Rep. 271.

M'GINNIS v. FARRELLY and others.

(Circuit Court, S. D. New York. March 26, 1886.)

PARTNERSHIP—SPECIAL PARTNER—PAYMENT OF CAPITAL BY CHECK—NEW JERSEY STATUTE.

The delivery before the filing of a certificate of special partnership, by a party intending to become a special partner to the general partners, of a check payable to their order, drawn on a bank, where he has funds to meet it, is not "an actual cash payment," within the meaning of the New Jersey statute, and will not entitle him to protection as a special partner.¹

At Law.

Abbett & Fuller, (Leon Abbett, of counsel,) for appellant.

John H. Shield, (W. C. Beecher, of counsel,) for plaintiff.

WALLACE, J. On the twenty-sixth day of February, 1883, the defendant Farrelly, with others, intending to form a limited partnership in which Farrelly was to be a special partner and the others general partners, executed a certificate in the form required by the laws of New Jersey, where the partnership business was to be carried on, which recited that the amount of capital contributed to the common stock by said Farrelly was the sum of \$2,500, and that the partnership was to commence on that day. Unless a limited partnership was formed pursuant to the statutes of New Jersey, the defendant Farrelly is liable to the plaintiff upon the demand in suit as a general partner. The question is whether the statutes of New Jersey were complied with.

The Revised Laws of New Jersey provide that such partnership may consist of one or more persons, who shall be called general partners, and of one or more persons who "shall be called special partners, and who shall contribute in actual cash payments a specific sum as capital to the common stock;" that a certificate shall be signed by the several persons, reciting, among other things, the amount of capital which shall have been contributed by the special partner;

¹See note at end of case.

that this certificate be filed in the office of the county clerk, and that there shall be filed with the certificate an affidavit of a general partner, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock "have been actually and in good faith paid in cash." The laws also provide that if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all engagements thereof as general partners. February 26, 1883, the certificate was acknowledged according to law, and, together with an affidavit of one of the general partners, verified on that day, in form according to statute, was filed in the office of the proper clerk. At this time Farrelly had not contributed any actual cash payment as capital except by drawing his check for the sum of \$2,500 on a New York city bank, and delivering it to one of the general partners. His check was good for the amount, he having at the time a large balance to his favor at the bank upon which it was drawn. The time when the check was delivered was after banking hours, and it was retained by the person to whom Farrelly delivered it until the twenty-sixth day of March thereafter. The check was not presented to the bank or used in the mean time, and on the twenty-sixth day of March was returned to Farrelly unpaid. Thereupon Farrelly drew a check for \$5,000, intended to cover the amount of the original check, and a loan to the partnership of \$2,500 in addition, which check was delivered to one of the firm, deposited to the credit of the firm, and the firm received the avails thereof.

It must be held that no actual cash payment had been contributed by Farrelly to the partnership when the certificate was filed. Similar statutes authorizing the creation of limited partnerships exist in several of the states of the Union, and have been the subject of judicial exposition. It is the well-settled doctrine that one who has not strictly complied with the requisitions of such statutes cannot claim exemption, as a special partner, from liability for the debts of the firm of which he is a member; and that his liability as a general partner is fixed if he has omitted to make his contribution to the capital of the firm in the mode required by the true construction of the statute. When the statute requires the contribution to be made in actual cash payments, nothing but money will satisfy its meaning.

In the case of *Haggerty v. Foster*, 103 Mass. 17, in speaking of such a statute, the court used this language:

"The statute is plain and explicit. It requires payment to be made when a certificate is signed, acknowledged, and recorded as the foundation of the partnership; and this certificate must recite what has been done, and not that which is executory. Its object is to provide a fund, on the day the company is formed, to be thereafter subject to no contingencies or losses except those which come from the proper business of the partnership. The use of the phrase 'actual cash payments' is emphatic and significant. It is wisely intended to exclude a construction by which commercial securities of any description short of cash may be regarded by the aid of mercantile usage or

otherwise as substantially equivalent to cash, and to remove from all parties the temptation to evade its requirements in this respect."

In *Durant v. Abendroth*, 69 N. Y. 148, where such a statute was under consideration by the court of appeals, the court said:

"The statute peremptorily requires an affidavit that the capital has been actually paid in cash. * * * The object of this provision is to secure certainty, and to prevent equivocal transactions in the formation of these partnerships. Nothing but cash satisfies its requirements. No engagement or security, however good, can be substituted even temporarily."

In *Van Ingen v. Whitman*, 62 N. Y. 513, it was held that a contribution in credits or in any other thing except cash, however convertible at the time into money, is not a compliance with the statute.

It would hardly be contended that the delivery of a check by the special partner, payable at a future day, would meet the requirements of the statute. It is urged, however, that the delivery of a check payable at sight is equivalent to an appropriation of a cash fund to the capital of the partnership, and is therefore a substantial compliance with the statute. If, instead of handing over the money, the special partner should deposit the amount of his contribution in a bank to the credit of the firm, or with a third person so as to part with all control over it by himself exclusively, and enable the general partners to appropriate it, it might well be urged that this would be a sufficient compliance with the statute. A sum may be deemed to be paid or contributed in cash when the money is placed within the absolute control of the person who is to receive it, although not within his manual custody. But where a check is drawn for the benefit of the payee upon a bank in which the drawer has a deposit, and is delivered to the payee, the latter does not acquire even an equitable lien upon the fund in bank. The relations between a banker and depositor to whose credit money is placed, is the ordinary relation of debtor and creditor, and has been universally so regarded since the question was elaborately discussed and decided in the house of lords in the case of *Foley v. Hill*, 2 H. L. Cas. 28. It is equally well settled that an assignment of a part of a debt will not bind the creditor either in equity or at law, nor deprive him of the right to pay the whole to the assignor after notice that part has been transferred to the assignee, (*Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15; *Hopkins v. Beebe*, 26 Pa. St. 85; *Gibson v. Finley*, 4 Md. Ch. 75;) and because the right of the depositor against a bank is merely that of a creditor, and an assignment of part of the deposit is not an equitable assignment of any interest in the fund, a bill of exchange or check, before acceptance, does not operate as a transfer of the funds of the drawer in the hands of the drawee, nor create any lien thereon. *Chapman v. White*, 6 N. Y. 412. The holder of a bank-check cannot sue the bank for refusing payment in the absence of proof that it was accepted by the bank or charged against the drawer.

Bank of the Republic v. Millard, 10 Wall. 152; *First Nat. Bank v. Whitman*, 94 U. S. 343.

A check is but an order on a depository, directing him to pay a certain sum to the payee or bearer. The drawer can intercept its payment at any time before actual payment or acceptance by the drawee. It does not furnish to the payee a fund which is subject to his exclusive control. It may be regarded by mercantile usage as equivalent to a cash payment; it may be convertible immediately into money; but its delivery to the general partners is not the payment in actual cash which is contemplated by the statute. No better illustration of the danger that would attend such a loose construction of the statute as would permit the terms "actual cash payment" to be fulfilled by the delivery of a check, payable at sight to the general partners, could be suggested than is shown by the facts of this case. Although the affidavit filed with the certificate stated that the contribution of the special partner had been actually and in good faith paid in cash, the money was not realized until a month subsequent to the filing of the affidavit. There may not have been any intentional bad faith in the transaction; but if it should be permitted to stand the purpose of the statute would be wholly frustrated.

Judgment is ordered for the plaintiff.

NOTE.

Statutory provisions respecting the formation of "limited partnerships" must be strictly pursued; and, where the statute requires the contribution of the "special" partner to be in cash, he cannot make it partly in cash and partly in goods, credits, or assets of another firm. *Lineweaver v. Slagle*, (Md.) 2 Atl. Rep. 693. The court in this case say that the contribution in government bonds or any other class of commercial securities, no matter how valuable they may be, or how easily convertible into money, cannot be accepted as a substitute for the "actual cash payments" which the statute requires; citing *Haviland v. Chace*, 39 Barb. 283; *Pierce v. Bryant*, 5 Allen, 91; *Haggerty v. Foster*, 103 Mass. 17; *Richardson v. Hogg*, 38 Pa. St. 153; *In re Merrill*, 12 Blatchf. 221; *Van Ingen v. Whitman*, 62 N. Y. 513.

Where, in the attempt to form a limited partnership, the special partner fails to contribute the cash capital as agreed upon, and as required by statute, he is liable as general partner. *Sharp v. Hutchinson*, (N. Y.) 3 N. E. Rep. 500. See, also, *Lineweaver v. Slagle*, (Md.) 2 Atl. Rep. 693.

MORGAN and others v. Cox and others.

(Circuit Court, W. D. Texas. 1886.)

1. EVIDENCE—RECORD OF DEED—ACKNOWLEDGMENT—NOTARIAL SEAL.

The record of a deed that recites that the notary public who took the acknowledgment had no proper seal, and used a private seal, is admissible in evidence in Texas.

2. SAME—DEED OFFERED IN EVIDENCE FOR ONE PURPOSE IN EVIDENCE FOR ALL PURPOSES.

Where plaintiff offers a deed on which his opponent relies as evidence of his title, in evidence, for the purpose of showing that such deed is a forgery, if the evidence fails to show that it is a forgery, it is in evidence for all purposes for which it could be used, and defendant may take advantage of it.

At Law.

TURNER, J. This is a suit by the plaintiffs, as heirs at law of Charles Morgan, deceased, for one league and labor of land situate in Llano county. The patent bears date December, A. D. 1848, survey No. 509, by virtue of certificate No. 493. The grantee, Charles Morgan, died February 14, 1847. The suit is in the usual form in trespass to try title,—petition filed July 15, 1885. The defendants filed their first answer, August 9, 1885, and their amended original answer, February 12, 1886. In this amendment they pleaded not guilty of the wrongs, etc., and the statute of limitations of five and ten years. They also pleaded valuable improvements in good faith. The same day, February 12, 1885, after defendants' amendment was filed, plaintiffs filed their first supplemental petition.

The defendants claim title as follows: (1) By virtue of an apparent transfer of the certificate No. 493, (by virtue of which the patent issued to Charles Morgan, as the assignee thereof,) from Charles Morgan, plaintiffs' ancestor, to one T. S. Milford; and (2) a transfer from the said T. S. Milford to one R. W. Nelson; (3) and from R. W. Nelson to Euceba Moore, wife of Nat. Moore. Under Moore and wife all the defendants claim.

In the plaintiffs' supplemental petition they plead, among other things, that if defendants do hold possession of the various portions of said league and labor, they each hold under and deraign their title under, through, and by virtue of, a forged transfer, from the grantee to one T. S. Milford, of the said certificate No. 493, by virtue of which the land was patented. An affidavit was also filed by the plaintiff on the twelfth day of February, 1886, stating that the affiant (one of the plaintiffs) believed the transfer from Charles Morgan to Thomas S. Milford was and is a forgery. Thus the pleadings stood when the parties proceeded to trial.

The plaintiffs proved themselves the heirs at law of Charles Morgan, deceased, and then introduced a certified copy of the patent to Charles Morgan for the land in controversy, and here the plaintiffs rested their case. The defendants then offered in evidence a deed from R. W. Nelson to Euceba Moore, (who was and is wife of Nat. Moore.) This deed is for the entire league and labor sued for, and bears date the twentieth day of January, 1875. Objections were made to the introduction of this deed, on account of want of a proper seal used by the notary public; and to the certificate of registration, because the certificate recites that the officer has no seal, and therefore uses a private seal. I think these objections untenable, and that the same was properly of record in 1875. It is under and through this deed that all the defendants deraign their titles; but, be that as it may, certain it is that the plea of limitations of five years, under the conditions prescribed by the statute, would have protected some of the defendants. But whether this be so is not, as I apprehend, of importance, as the finding of the jury cuts off all right to recover, if the same shall be permitted to stand.

After the defendants had offered their evidence of possession and of improvements, plaintiffs were unwilling to risk their case upon the objections made to the introduction of many of the deeds under which defendants claimed. I should have stated, however, that the defendants rested their case after introducing their deeds, and evidence of use and occupation, payment of taxes, etc. The plaintiffs, I say, seemed unwilling to trust the case in that condition, and plaintiffs then offered in evidence the transfer which they had declared a forgery, viz., a purported transfer from Charles Morgan to T. S. Milford to the certificate, and then offered in evidence a transfer from T. S. Milford to Robert W. Nelson, no objection being made to the introduction of the same by the defendants; the plaintiffs asserting that they introduced the same in order to show that the same was a forgery, and if that were established, it precluded the defendants from all benefit of the five years limitation. This transfer or purported transfer from Charles Morgan to Milford bears date, or rather the acknowledgment bears date, the sixth day of November, 1840; and was taken by Thomas Harvey, notary public. There is nothing on its face indicating that the same is not valid, and the evidence showed that Harvey was a notary in Matagorda county when the acknowledgment purports to have been taken. The transfer from Milford to Nelson bears date the eighteenth day of October, 1850, acknowledged before S. W. PERKINS, chief justice of Brazoria county. I have before stated that R. W. Nelson deeded the same to Mrs. Nat. Moore, January 20, 1875. It thus appears that, if the deed from Charles Morgan to Milford was and is a genuine deed, the plaintiffs have no interest in the land, and that the defendants have a regular chain of title, from and under the sovereignty, of the soil, as, under our statute, the patent to the land, although to Charles Morgan, inures to the benefit of his assignees.

As I stated, the plaintiffs themselves offered in evidence the transfer from Charles Morgan to Milford, and no objection was made to its introduction by the defendants. The plaintiffs, being advised of the existence of this transfer, filed an affidavit stating that the same was believed to be a forgery. This affidavit precluded the defendants from introducing the same in evidence without establishing its genuineness. It may well be understood how difficult it would be for the defendants to prove that fact in the mode required by the common law. The defendants, therefore, without attempting this arduous task, saw fit to rest their case upon the proofs adduced by them of possession, use, and occupation under their deeds. It is believed that when the plaintiffs saw fit to put the same, *i. e.*, the transfer from Morgan, in evidence, that it was too late for them to assert that the same was not there for all legal purposes; and the defendants, in order to claim the benefits thereof, were relieved from proving such facts as would have been necessary for them to have shown in order to establish it as an ancient document. The force of the argument,

and the application of the authorities, produced by plaintiffs, in order to sustain and establish as valid an instrument bearing date 30 years ago and upwards, is recognized, but it is believed that those rules can have no bearing in this case, as the plaintiffs themselves offered the same, and no objection was made by the defendants, and after the same was put in evidence by the plaintiffs it was too late for them to say that it was not properly in evidence for all legal purposes. It is true that plaintiff said they introduced it to show that the same was a forgery,—to deprive the defendants of the benefits of the laws of limitation of five years. It is not believed, however, that the plaintiffs could occupy the position of having placed the same in evidence with a view to show the same to be a forgery; and, failing in that, that something more must be shown by the defendants in order to avail themselves of it in showing title out of plaintiffs and in them. The plaintiffs took the hazard, when they put the same in evidence, of establishing its forgery, or of giving the defendants the full benefit thereof in establishing their title. If this be true, then, as the jury say by their verdict that the evidence fails to satisfy them that the same is a forgery, of course the plaintiffs inherited nothing, so far as this tract of land is concerned, and the verdict must stand, if the charge by the court was correct, viz.: That, as the plaintiffs had put the transfer in evidence, after having asserted the same was a forgery, the burden of proof was upon the plaintiffs to satisfy the jury that it was so.

There are many facts and circumstances that tend to the conclusion that the same is genuine: (1) Its age; (2) there is nothing upon its face to cast suspicion upon its validity; (3) the acknowledgment was taken before a person shown to have been a notary public; (4) the evidence shows that when the transfer from Nelson to Mrs. Moore was made, this transfer was passed into Mrs. Moore's hands. At all events the evidence is that when A. H. Cox, one of the defendants, purchased of Moore and wife, the transfer from Morgan to Milford, the transfer from Milford to Nelson, the transfer from Nelson to Mrs. Moore, together with the patent for the land, were respectively exhibited to him (Cox) by Moore and wife. Again, one of the plaintiffs (and the only plaintiff who was a witness) testified that they had no knowledge of any claim they had in these lands, and never were advised of it until a land agent of the city of Austin advised them of it, and offered to bear all the expenses of the trial for the one-half of what might be recovered. True, this plaintiff produced in evidence what was denominated a will, which he said bore the genuine signature of Charles Morgan, and he gave it as his opinion that he did not think the signature to the transfer genuine. And Mr. R. Fisher was placed on the stand, and by comparing the signature to the transfer with that to the will, said he did not think they were written by the same person. The jury had both signatures before them, as well as the evidence referred to, and were not satisfied of the alleged forgery. These signatures are both written with a tremulous hand, and I am unable

to discover the disparity spoken of by the expert Fisher. The signatures are both written in small letters, the one to the will in full length, "Charles Morgan." If it was the uniform custom of Mr. Morgan to write his name in full, (about which there is, however, no evidence,) a person who undertook to counterfeit would hardly have abbreviated the first name. The similarity to my mind, however, is such that I feel confident that it is really genuine, or that the person imitating had knowledge of the real, true signature of Mr. Morgan.

The rule is that he who affirms a fact has the burden upon himself of proving that fact. The plaintiffs affirmed the forgery, and attempted to establish it. In this the jury have said they have failed, and the plaintiffs now affirm that the defendants should have been charged with the burden of showing its genuineness before they could avail themselves of the benefit of the transfer. I cannot subscribe to the doctrine. It appears to me that the plaintiffs, in order to avoid the effect of the statute of limitations of five years, erected a target. Upon their ability to demolish the same they trusted their case; and, having failed in that, their right to recover was demolished, rather than the target.

For the reasons above stated I decline to disturb the verdict. My views being correct, I deem it unnecessary and unimportant to discuss whether any errors were committed in the introduction of other evidence, as the view taken shows that the plaintiffs never had any right of action at all.

GRANDAL v. ACCIDENT INS. CO. OF N. A.

(Circuit Court, N. D. Illinois. March, 1886.)

1. ACCIDENT INSURANCE—POLICY—DEATH FROM HANGING.

Death from hanging, when the insured is insane, is a death effected through external, accidental, and violent means, within the meaning of a policy of accident insurance.

2. SAME—DEATH NOT CAUSED BY BODILY INFIRMITY OR DISEASE.

The policy in this case provided that the insurance should not extend to death or disability "which may have been caused wholly or in part by bodily infirmities or disease." *Held*, that within the intent of the contract, and the meaning of the law, the death was caused, not by bodily infirmity or disease, but by the act of self-destruction.

At Law.

House, Fry & Babb, for plaintiff.

Thomas Bates, for defendant.

DYER, J. On the twenty-third day of May, 1884, the defendant company issued to Edward M. Crandal, since deceased, an accident

policy of insurance, by which it promised to pay to the plaintiff, who was the wife of the insured, the sum of \$10,000, within 30 days after sufficient proof that the insured, at any time within the continuance of the policy, had sustained bodily injuries, effected through external, accidental, and violent means, within the intent and meaning of the contract, and the conditions thereunto annexed, and such injuries alone had occasioned death within 90 days from the happening thereof. It was provided in the policy that the insurance should not extend to death or disability "which may have been caused wholly or in part by bodily infirmities or disease." Further, that no claim should be made under the policy if the death or injury should be caused by suicide or self-inflicted injuries.

While this policy was in force, the insured, Edward M. Crandal, took his own life by hanging, and the jury to whom the case was submitted for a special verdict on the facts, has found that at the time of the act of self-destruction he was insane. The question reserved for consideration by the court, and now to be determined, is whether the death was one covered by the policy. The question of liability, as it here arises, upon an accident policy of insurance, seems to be one of first impression. Unaided by direct authority, the court is called on to determine, *first*, whether, under such a policy as this, death from self-destruction, occurring when the insured is insane, may be said to have been caused by bodily injuries effected through accidental means. This question, it will be understood, is here to be considered quite independently of the question whether disease or physical infirmity was a promoting cause of death.

The verdict of the jury was unquestionably right. The case was one in which the evidence clearly established the fact of insanity. The symptoms of a disordered mind were manifested in the countenance, conduct, and conversation of the insured. He was sleepless, was sometimes unduly excited, then unnaturally depressed. He suffered to such an extent from melancholy that he abandoned his accustomed habits and pursuits. Fondness for family and friends changed to indifference; and, in short, his reasoning powers and self-control appear to have been prostrated by the fear of want and by morbid impulses and delusions, such as, in this species of insanity, impel to self-destruction. Upon the facts shown, the jury might well find that his judgment, his volition, his will, were overthrown, so that, in the language of Mr. Justice NELSON, when chief justice of New York, in the case of *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill, 73, 75, the act of suicide "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical power."

Upon the verdict and the facts which sustain it, it may then be assumed that when the deceased took his life it was not his voluntary, rational act. He could not exercise his natural powers of volition, and thereby control his judgment upon the act he was about to commit. The physical violence, therefore, which terminated his life

was the same as if it had come upon him from sources outside of himself, and for which he was not responsible. It was force emanating, not from the brain and hand of Edward M. Crandal, as a responsible, voluntary agent, but force which was uncontrollable, so far as he was concerned. The means employed to produce death were external and violent. Were they not also, in a just and true sense, accidental, if the deceased was so far bereft of his reasoning faculties that his act was not the result of his will, or of a voluntary operation of his mind? If, in consequence of his condition of irresponsibility, the violence which he inflicted upon himself was the same as if it had operated upon him from without, then why was not the death an accident within the definition of that term as given by Bouvier, namely: "An event which, under the circumstances, is unusual and unexpected by the person to whom it happens; *the happening of an event without the concurrence of the will of the person by whose agency it was caused?*"

No case has been cited where the question, as here presented, was directly in judgment, but there are *dicta* which afford some aid in reaching a conclusion. In 7 Amer. Law Rev. 587, 588, various definitions of an accident, as the term is used in insurance policies, are given, namely:

"An accident is 'any event which takes place without the oversight or expectation of the person acted upon or affected by the event.' *Ripley v. Railway Passengers' Assur. Co.*, 2 Bigelow, Cas. 758; *Providence Life Ins. Co. v. Martin*, 32 Md. 310. It is 'any unexpected event which happens as by chance, or which does not take place according to the usual course of things.' *North American Ins. Co. v. Burroughs*, 69 Pa. St. 43. 'It is something which takes place without any intelligent or apparent cause; *without design, and out of course.*' *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52. 'Some violence, casualty, or *vis major* is necessarily involved' in the term accident. It means, in short, in insurance policies, an injury which happens by reason of some violence, casualty, or *vis major* to the assured, without his design or consent, or voluntary co-operation."

Similar definitions are given by Mr. Justice PAINE in his discussion of the question in *Schneider v. Insurance Co.*, 24 Wis. 30.

In *Scheiderer v. Insurance Co.*, 58 Wis. 14, S. C. 16 N. W. Rep. 47, it was alleged in the pleading that while the insured, who was traveling in a railway car, "*was in a dozed and unconscious condition of mind, and not knowing or realizing what he was doing,*" he involuntarily arose from his seat, and walked unconsciously to the platform of the car, and fell therefrom to the ground; and it was held that this constituted a good cause of action upon a policy of accident insurance. Here, it is true, the injury resulted from falling from the car; but since the moving cause was the *involuntary act* of leaving the seat and walking to the platform, the case suggests the inquiry, if, for example, a person in a fit of somnambulism, or in delirium, *not knowing or realizing what he is doing*, involuntarily inflicts injury upon himself,—that is, by means of his own hand,—and death en-

sues, is not such an injury as much the result of accident as if, in the same circumstances, the injury results from other external forces, such as falling from the platform of a moving train?

In *Hill v. Insurance Co.*, 22 Hun, 189, the insured took poison by mistake, and died suddenly. The court said that death occurred through accidental means. The taking of the poison was not the result of the will or intention of the person, and was therefore not his voluntary act. It was adjudged, however, that the plaintiff could not recover, on the ground that the policy contained a clause that the company should not be liable if death should be caused by taking poison; and this clause was held to exempt the company from liability, whether the poison was taken intentionally or by mistake.

In *Pierce v. Travelers' Ins. Co.*, 34 Wis. 395, Mr. Chief Justice Dixon, speaking for the court, in interpreting the clause in the policy in question in that case, referred to instances of death resulting from an act committed under the influence of delirium,—as if the person should, in a paroxysm of fever, precipitate himself from a window, or, having been bled, remove the bandages, or should take poison by mistake,—and observed that deaths thus produced “are more properly denominated deaths by accident than deaths by suicide. * * * Deaths so caused are held to be deaths by accident, within the meaning and purpose of policies of insurance against accident; as where a man negligently draws a loaded gun towards him by the muzzle, or the servant fills the lighted lamp with kerosene, and the gun is discharged and the lamp explodes.”

In *Horn v. Life Ins. Co.*, 7 Jur. (N. S.) 673, the court, in passing upon the question whether a policy of insurance upon life is rendered void by the suicide of the insured when insane, speaks of such a death as just as much an accident as if the insured had fallen from the top of a house.

In *Breasted v Farmers' L. & T. Co.*, 8 N. Y. 306, it was observed by the court that “a death by accident, and a death by the party's own hand, when deprived of reason, stand, on principle, in the same category. In both cases the act is done without a controlling mind.”

To maintain the position that because his own hand constituted the violent means employed by the insured in taking his life, those means were not external and accidental, it is necessary to take a distinction between force emanating from the insane person himself and force operating independently from without. I can hardly think there is ground for such a distinction. The injury and the death seem equally fortuitous in both cases, for in neither case is there a concurring will which prompts the act. An insane man burns his own insured property. The insurer is nevertheless liable for the loss unless its contract expressly exempts it from liability, even in case of such a burning; this for the reason that the act was not voluntary, or done with the assent, procurement, or design of the assured as a

rational person. *Karow v. Continental Ins. Co.*, 57 Wis. 56; S. C. 15 N. W. Rep. 27. Although, in the darkness that enveloped his mind, the hand of Edward M. Crandal adjusted the fatal noose, the act was no more attributable to his voluntary agency than if, as a sane man walking the street in the darkness of night, the same fatality, without co-operation on his part, or even consciousness of danger, had overtaken him. Therefore it would seem that, in the one case as in the other, the death would be attributable to casualty.

Additional force is given to this view of the question when we consider that in cases arising upon life insurance policies, decided by the supreme court of the United States, it has been repeatedly held that if the insured, while in the possession of his ordinary reasoning faculties, from any motive intentionally takes his own life, such death is within the proviso on the subject of suicide, and the insurer is not liable. On the contrary, if the insured takes his life when insane, then the death cannot be said to be "by his own hand," and the insurer is liable. And so it would seem to follow that as in the latter instance the act of self-destruction is not the act of the party, it must be regarded, in a case like the present, as brought about by means which are accidental, because not the result of the concurring will of the insured.

It is to be further observed that in the policy in suit the company declares that it incurs no liability in case of death from suicide or self-inflicted injuries. Thus, it appears that the insurer took into consideration the possibility that the insured might voluntarily, and with deliberate intent,—that is, as a sane person,—take his life, and in such case the death was not to be regarded as covered by the contract, because not effected by accidental means. This is the import of this clause in the policy. But no provision is made against suicide when insane; and this also adds force to the view that the contract is fairly open to the construction contended for by the plaintiff. By the term "self-inflicted injuries," as used in the policy, was not meant injuries inflicted by the insured upon himself when insane, but injuries, self-inflicted, when capable of rational, voluntary action.

Several cases have been cited by counsel for the defendant. Among them is *Harris v. Travelers' Ins. Co.*, decided by the superior court of Chicago in 1868, and referred to in 7 Amer. Law. Rev. 589; but the point here involved does not seem to have been there raised. The deceased was a fireman, who was accidentally buried under a falling wall, but was soon rescued without apparent injury, and continued his work for three months, when he took poison. In a suit to recover the insurance on the ground that the accident rendered him insane, it was held that if he was insane on account of the accident, the death was too remote to be covered by the policy, which included only proximate results. It would seem that the plaintiff relied upon the original accident as a ground of recovery, and that

was held too remote. Another case cited is *Pollock v. United States Mut. Accident Ass'n*, 28 Alb. Law J. 518; but all that was decided in that case was that the defendant was not liable for a death by poison, because the contract so expressly provided; and in view of that provision, it made no difference whether the poison was innocently or intentionally taken. There was no question of insanity involved, and, moreover, the death was not caused by "external violence," and this was one of the prerequisites to recover, as fixed in the contract. In *Bayless v. Travelers' Ins. Co.*, 14 Blatchf. 144, the question of insanity did not arise, and it is on the same line, in principle, with *Pollock v. United States Mut. Accident Ass'n*, *supra*.

On the whole, my conclusion is that the death of the insured, Edward M. Crandal, resulted from bodily injuries effected through external, accidental, and violent means, within the meaning of the policy in suit.

Second. Still another and equally interesting question remains to be determined. The contention of the defendant is that the death in this case was caused by bodily infirmities or disease, namely, the insanity of the insured, and therefore that the plaintiff cannot recover. As has been observed, the policy provides that the company shall not be liable if the death be "caused wholly or in part by bodily infirmities or disease." The policy further recites that it is issued in consideration of the warranties made in the application for insurance, and of the premium paid; and in the application signed by the insured he makes certain statements of fact, usual in such cases, the last of which, numbered 15, is as follows:

"I am aware that this insurance will not extend to * * * any bodily injury happening directly or indirectly in consequence of disease; nor to death or disability caused wholly or in part by bodily infirmities or by disease; * * * nor to any case, except when the accidental injury shall be the proximate and sole cause of disability or death."

This is not a warranty of any fact. It is, in effect, merely an admission of knowledge on the part of the insured of such limitations of liability as may be declared in the policy. As, therefore, it is to the policy we must look for those limitations, it is observable that the policy does not declare that the insurance shall not extend to any bodily injury "*happening directly or indirectly in consequence of disease*;" but only that it shall not extend "*to death or disability which may have been caused wholly or in part by bodily infirmities or disease*." This, then, is the limitation of liability to be considered, as it is expressed in the policy issued and delivered subsequently to the application for insurance, rather than the statements on the subject contained in the application. The fifteenth clause in the application is not referred to in the policy. Wherein, therefore, it differs from the written contract it is no part of the contract.

The argument of counsel for the defendant is, in brief, that insanity is a bodily infirmity or disease; that in ordinary life insur-

ance cases it is regarded and characterized by the courts as a disease, and therefore it is that insurance companies are held liable in cases of suicide when the insured was insane; further, that in the case in hand the act of self-destruction was occasioned by the insanity, and so, that within the meaning of the policy, the death was caused by disease. I was much impressed with the force of this argument, and if I may use the language of DENMAN, J., in a case hereafter referred to, "but for *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42, I am not sure but that I should have thought the company were protected."

It is true that in cases upon life policies death by an insane suicide is regarded by the courts as death by disease. As it is expressed in *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224, "death by disease is provided for by the policy. Insanity is a disease. Death which is the result of insanity is death by disease." It is to be borne in mind, however, that these and similar observations are made in a class of cases where the insurance is not special but general, and where the protection which it is intended to afford covers all diseases and disorders—other than those which may be specially excepted—which result in death. In the case of a life policy, it may not matter whether the disease of insanity or the particular act of self-destruction be regarded as the immediate cause of death. It is the life which is insured, and liability arises when death occurs, unless the death is within one of the specially excepted cases enumerated in the policy. The fact, therefore, that in such cases it is said that death which is the result of insanity is death by disease does not reach the question we have here, which is, what, under the provisions of a policy which covers accidents only, was the cause of death? In the sense of the clauses on the subject in this policy, was the death caused by disease, or by the act of violence in question? Although the words of the policy are, "caused *wholly or in part* by bodily infirmities or disease," I suppose the true inquiry is, what was the actual, proximate cause of death? For, in law, there is but one cause. That is the proximate cause, which may either directly or indirectly produce the result. If the death was caused *in part* by disease, the disease must have been a proximate cause of death.

"One of the most valuable *criteria* furnished us by the authorities," says Mr. Justice MILLER, in *Insurance Co. v. Tweed*, 7 Wall. 44, "is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In *Insurance Co. v. Transportation Co.*, 12 Wall 199, it was said by Mr. Justice STRONG:

"There is undoubtedly difficulty in many cases attending the application of the maxim, *proxima causa non remota spectatur*, but none when the causes succeed each other in order of time. In such cases the rule is plain.

When one of several successive causes is sufficient to produce that effect, the law will not regard an antecedent cause of that cause, or the *causa causans*. In such a case there is no doubt which cause is the proximate one, within the meaning of the maxim. But when there is no order of succession in time,—when there are two concurrent causes of a loss,—the *predominating, efficient one* must be regarded as the proximate, when the damage done by each cannot be distinguished.”

The cases most nearly in point upon the question here in judgment are *Reynolds v. Accidental Ins. Co.*, 22 Law T. (N. S.) 820; *Winspear v. Accident Ins. Co.* 6 Q. B. Div. 42; *Lawrence v. Accidental Ins. Co.*, 7 Q. B. Div. 216; and *Scheffer v. Railroad Co.*, 105 U. S. 249.

Although it may extend this opinion to greater length than is desirable, it seems necessary to give attention to these cases somewhat in detail.

In the *Reynolds Case* the facts were that Thomas Humphrey effected with the defendant company “a policy of insurance, whereby it was declared that if, during the continuance of such policy, the said Thomas Humphrey should receive or suffer bodily injury from any accident or violence, in case such accident or violence *should cause the death* of the said Thomas Humphrey within three calendar months after the occurrence of such accident or violence, the full sum of three hundred pounds should be payable to the personal representatives, etc.: provided, also, and it is hereby expressly agreed and declared, that no claim shall be payable by the said company under the policy in respect of death or injury by accident or violence, unless such death or injury shall be occasioned by some external and material cause operating upon the person of the said insured, and unless, in the case of death, as aforesaid, *such death shall take place from such accident or violence* within three calendar months,” etc. It appeared that Humphrey, while the policy was in force, went into the sea to bathe. While in a pool about one foot deep he became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards. A few minutes afterwards he was found lying dead, with his face in the water, and water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. The question for the opinion of the court was whether the death of Humphrey occurred in a manner entitling the plaintiff, as his executor, to receive the sum of £300 under or by virtue of the policy. Bosanquet, for the defendant, argued that “if a man is pushed into the water, or forcibly held down in it, his death then results from violence, within the meaning of the policy. If a man accidentally falls into water, and is drowned, his death results from accident; *but if a man falls down in a fit in a shallow pool, and is drowned, his death is the result, not of accident or of violence, but of the fit*, even though the immediate cause of death be, as here, suffocation by drowning.” WILLES, J., said: “In this case the death resulted from the action of the water on the lungs, and from the consequent interference with respiration. I think that *the fact of the de-*

ceased falling in the water from sudden insensibility was an accident, and consequently that our judgment must be for the plaintiff." It is to be observed of this case that it has only a general application to the question under consideration, because the proviso in the policy contained no such condition as we have here in relation to disease as a cause, in whole or in part, of death.

In the *Winspear Case* the facts were that W. effected an insurance with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to W.'s legal representatives, should he sustain "any personal injury caused by accidental, external, and visible means," and the *direct effect* of such injury should cause his death. The policy also contained a proviso that the insurance should not extend "*to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, * * * or to any death arising from disease, although such death may have been accelerated by accident.*" During the time the policy was in force, and while W. was crossing a stream, he was seized by an epileptic fit, and fell into the stream, and was drowned *while suffering from the fit*, but he did not sustain any personal injury to occasion death other than drowning. Here it was argued that there would have been no drowning had the insured not had an epileptic fit; that it was the fit which caused the drowning; and that the death, therefore, was from an injury caused by the fit; just as it is argued in the case at bar that there would have been no suicide had the insured not been insane; that it was the insanity which caused the suicide, and that, therefore, the death was from an injury caused by insanity. But Lord COLERIDGE, C. J., said:

"I am of opinion that this judgment should be affirmed, and that on very plain grounds. It appears to be clear from the statement in this case that the insured died from drowning in the waters of the brook, while in an epileptic fit, and drowning has been decided to be an injury because, in the words of this policy, caused by 'accidental, external, and visible means.' I am, therefore, of opinion that the injury from which he died was a risk covered by this policy; and the only question, then, remaining is whether the case is within the proviso which provides that the insurance 'shall not extend to death by suicide, whether felonious or otherwise, or *to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.*' It is certainly not within the first part of this proviso because the death was not so occasioned. Neither does it appear to me that the cause of death was within those latter words of the proviso. *The death was not caused by any natural disease, or weakness or exhaustion consequent upon disease, but by the accident of drowning.* I am of opinion that those words in the proviso mean what they say, and that they point to an injury caused by natural disease; as if, for instance, in the present case, epilepsy had really been the cause of the death. The death, however, did not arise from any such cause, and those words have no application to the case, and therefore the judgment of the exchequer division must be affirmed."

This case, in its facts and upon principle, appears to be directly in point; for if there the death was not in a legal sense caused by

the fit, but by the drowning, so here it was not caused by the insanity or disease, but by the act of self-destruction.

In the case of *Lawrence* there was a policy of insurance against death from accidental injury, which contained the following condition:

"This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured; * * * *but it does not insure in case of death arising from fits, * * * or any disease whatever arising before or at the time or following such accidental injury, (whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury.)*"

The insured, while at a railway station, was seized by a fit, and fell off the platform across the railway, and an engine and carriages passed over his body and killed him. The falling forward of the insured off the platform was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered injury and death. DENMAN, J., following the authority of *Winspear v. Accident Ins. Co.*, held the company liable. WILLIAMS, J., placed his concurring opinion upon the following grounds:

"The whole case depends on the true construction of the words in the proviso, because in this case the deceased person, having fallen down accidentally in a fit from the platform of the railway on to the rails, was, while lying there, accidentally run over by a train that happened at that moment unfortunately to come up, and he was undoubtedly killed by the direct external violence of the engine upon his body, which caused his death immediately. The question arises whether, according to the true construction of the proviso, it can be said that this is a case of a death arising from a fit; because, if this death did not arise from the fit, according to the true construction of the policy, the remainder of the clause does not come into existence at all, and is inapplicable. It seems to me that the well-known maxim of Lord BACON, which is applicable to all departments of the law, is directly applicable in this case. Lord BACON's language in his *Maxims of the Law*, reg. 1, runs thus: 'It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause.' Therefore I say, according to the true principle of law, I must look at only the immediate and proximate cause of death; and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person; for had he not been born, the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated; and it is not the less so because you can show that another cause intervened and assisted in the causation."

Thus it appears that although the proviso in the policy in that case was that if the death should arise from a fit the company should not be liable, even though accidental injury contributed to the death by

operating jointly with the fit, it was nevertheless held essential to show that the fit was a cause in the sense of being the immediate cause of death, in order to exonerate the company.

Scheffer v. Railroad Co., *supra*, only has application here by way of analogy. In that case a passenger on a railway car was injured by a collision of trains, and, becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. It was held, in a suit by his personal representatives against the railway company, that his own act was the proximate cause of his death, and that, therefore, there could be no recovery.

Although it may be said that Crandal would not have committed suicide had he not been insane, and so that the insanity was a promoting cause of death, upon the reasoning and authority of the cases referred to, the conclusion seems unavoidable that the act of self-destruction must be regarded, within the meaning of the policy, as the true and proximate cause of his death. Quite against my first impressions when the case was submitted, I am constrained to hold, upon deliberate consideration, that the plaintiff is entitled to recover. If I am wrong in my conclusions, it is a gratification to know that the case is one that may be taken to the supreme court for its judgment, and in which the error, if error has been committed, may be there corrected.

Judgment for plaintiff on the verdict.

BANKS & BROS. *v.* WEST PUBLISHING Co. and another.¹

(Circuit Court, D. Minnesota. April, 1886.)

1. COPYRIGHT—RIGHT OF STATE IN OPINIONS OF JUDGES.

Whether a state, by virtue of the common law, has, or by the copyright acts of congress can acquire, any property right in the opinions of the judges of its supreme court, discussed, but not decided.

2. SAME—REPORTS OF JUDICIAL OPINIONS—WHAT PROTECTED.

It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them, and such publication may be of everything which is the work of the judges. The copyright of the volume does not interfere with such free publication, as it protects only the work of the reporter.

3. SAME—PUBLICATION OF IOWA DECISIONS—STATUTES AND CONTRACT CONSTRUED.

The Iowa statutes of 1873 and 1880, and the contract made with complainant under the authority of the act of 1880, construed, and *held* that the opinions of the judges of the supreme court of that state are free to all; that the copyright to be obtained for the benefit of the state was intended to protect only the completed volumes; and that no right of complainant is violated by the publication of the opinions by another publisher in advance of the official reports.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

In Equity.

This is a suit brought by the complainants to restrain the defendant from publishing the opinions of the supreme court of Iowa, the complainants claiming that the exclusive right of such publication is vested in them. The Northwestern Reporter, in which are published these opinions, as well as those of the supreme courts of other north-western states, was first issued by the defendant in 1879, and has been since a continuous weekly publication. It is this publication of opinions which the complainants seek to enjoin. The exclusive right of complainants is claimed by virtue of a contract with the state of Iowa of date July 8, 1880, full compliance with whose terms is alleged. The statute, chapter 60, Laws Iowa 1880, under which the contract was made, and such portions of the laws of 1873 as define the duties of clerk and reporter in respect to the opinions and Reports, are as follows:

Whereas, by the provisions of chapter 60 of the Acts of the Eighteenth General Assembly of the state of Iowa, the executive council is authorized to contract for the printing and publishing of the reports of the opinions of the supreme court of Iowa; and whereas, the said executive council, in accordance with the provisions of section 4 of said chapter, did publish in six different newspapers, published in different localities in the said state, weekly for six weeks, commencing on the first week in April, A. D. 1880, a notice to the effect that sealed proposals would be received at the office of the secretary of state, for stereotyping, printing, publishing, and selling the said Reports for the term of eight years, from the first day of June of said year, at a certain rate per volume, to be stated in said proposals, the bids to be received on or before 12 o'clock, noon, of May 31, 1880; and whereas, Banks & Bros., before the said first day of June, 1880, and after the publication of said notice, to-wit, on the thirty-first day of May, 1880, did, before noon of said day, in accordance with said notice and the law, deposit with the secretary of state their sealed proposal as follows:

"To enter into a contract for stereotyping, printing, publishing, and selling the reports of the decisions of the supreme court of Iowa for the term of eight years from the first day of June, 1880, as required by and subject to the provisions of chapter 60 of the Eighteenth General Assembly of Iowa, the same being an act entitled 'An act to provide for the stereotyping, printing, publishing, and sale of the Supreme Court Reports, and to repeal sections 155, 156, 157, and 160, c. 4, tit. 3, of Code, and to fix the salary of the supreme court reporter,' for the sum of ninety-four cents per volume; and we attach hereto the receipt of the treasurer of the state of Iowa, showing that we have, in compliance with section 5 of said act, deposited with him the sum of one thousand dollars, to be forfeited to said state of Iowa on failure to enter into said contract, as required by said act.

"BANKS & BROTHERS,

"Per JOSEPH G. JENNINGS,

"Attorney in Fact."

—Therefore, know all men by these presents, that, in consideration of the foregoing premises, said Banks & Bros. hereby agree with the state of Iowa that they will stereotype, print, publish, and sell the reports of the supreme court of the state of Iowa, in accordance with the provisions of said chapter 60 of the Acts of the Eighteenth General Assembly, said chapter being herein referred to as a part hereof, for the term of eight years from and after the first

day of June, 1880. Said Banks & Bros. further agree to deliver to the secretary of state, at the capitol, at Des Moines, 250 copies of each volume of said Reports free of cost of publication or delivery, at the earliest practicable time, and within 60 days after the delivery of the manuscript for any one copy of such Reports to them; that they will stereotype the same, and at all times keep said Reports on sale in the state of Iowa to residents of said state, for actual use, at the price of 94 cents per volume, in suitable quantity, in the city of Des Moines; that they will furnish the state any number of additional copies that may be required for its own use, at said price, and will procure new stereotype plates whenever the original plates shall become defaced or destroyed. The said Banks & Bros. further agree that they will not take out in their own name, nor in the name of any other person than the secretary of state of the state of Iowa, a copyright for any one of the volumes published under this contract, but that they will take out the copyright in the name of the secretary of state as aforesaid; and they hereby covenant that, in case they should take out a copyright for any one of said volumes in the name of any other person than said secretary of state, they will forfeit and pay to the state of Iowa the sum of \$2,000 for each breach of this contract. Said sum of \$2,000 is hereby agreed on as liquidated damages for each breach of said covenant.

It is further agreed by the said Banks & Bros. that if it is determined in any action on their bond, given for the faithful performance of this contract, that they have failed in any respect to comply with the provisions of said chapter 60, or of this contract, the executive council may declare the contract forfeited; and that upon such forfeiture so declared they will, upon demand, transfer to the secretary of state of the state of Iowa, for the use of said state, the stereotype plates of each volume of said Reports published under this contract, or, in default, will pay to the treasurer of the state of Iowa \$2,000 for each of such volumes, as liquidated damages for failure to make such transfer.

It is agreed on the part of the state of Iowa that the reporter make a volume as provided for in section 1 of said chapter 60,—copies of such opinions, with syllabus, with statement of facts involved, and legal propositions made by counsel in the arguments, with authorities cited,—and within 20 days after the proof-sheets for a volume are furnished to said reporter at his office in Des Moines, Iowa, by said Banks & Bros., it is agreed that said reporter shall furnish to the said Banks & Bros. an index and table of cases to such volume.

The said Banks & Bros. further agree to furnish to the reporter, as soon as they may be issued, two copies of the revised proof-sheets of the opinions, head-notes, indexes, and table of cases of each volume, for correction and approval by the judges of the supreme court, and will cause such corrections to be made as indicated by the judges.

It is further agreed and understood that each of said volumes of Reports shall contain not less than 750 nor more than 800 pages, exclusive of table of cases and index, and said Banks & Bros. further undertake and agree that the workmanship and quality of material in said volumes of Reports published by them under this contract shall in every respect be equal to that of the first issue of volume 40 of Iowa Reports; and, further, that each of said volumes published under this contract shall be approved and accepted by a majority of the judges of the said supreme court of Iowa.

It is further agreed that the said Banks & Bros., their successors and assigns, shall have the right to the exclusive publication and sale of each of said volumes of Reports so long as they shall in all respects comply with the requirements of the act hereinbefore mentioned in respect to the character, sale, and price of such volume, and the copyright of the Reports published under this contract shall rest in the secretary of state for the benefit of the people of the state of Iowa, in accordance with section 2 of said act.

In witness whereof, the said Banks & Bros. and the executive council of

the state of Iowa have hereunto set our hands this eighth day of July, A. D. 1880.

BANKS & BROTHERS.

Signed and witnessed, as to Banks & Bros., June 24, 1880.

JOSEPH G. JENNINGS.

JOHN H. GEAR, Governor.

J. A. HULL, Secretary of State.

B. R. SHERMAN, Auditor of State.

GEO. W. BEMIS, Treasurer of State.

(Title III., Iowa Code 1873, page 26.)

CHAPTER 2.

OF THE CLERK OF THE SUPREME COURT.

Sec. 146. The office of the clerk of the supreme court shall be kept at the seat of government, and he shall keep a complete record of all proceedings of the court.

Sec. 147. He must not allow any written opinion of the court to be removed from his office except by the reporter, but shall permit any one to examine or copy the same, and shall, when required, make a copy and certify to the same.

Sec. 148. He shall promptly announce by letter any decision rendered to one of the attorneys of each side when such attorneys are not in attendance at the place of court.

Sec. 149. He shall record every opinion rendered by the court as soon as filed, and shall perform all the duties pertaining to his office.

CHAPTER 4.

OF THE SUPREME COURT REPORTER.

Sec. 154. When the opinions filed at any term of the supreme court are recorded by the clerk, the reporter may take and retain the same for a period not exceeding four months, to prepare a report therefrom, but within such time they shall be returned to and remain in the office of such clerk.

Sec. 155. He shall, as soon as practicable after a case is decided, prepare for publication a syllabus of the opinion, a brief abstract of the facts involved, and a statement of the legal propositions made by counsel in the argument; but the argument shall not be reported at length.

Sec. 156. As often as there shall be sufficient matter to constitute a volume of 600 pages, exclusive of the index and table of cases, the reporter shall arrange the same, with a table of cases and an index, and publish the same in a manner and style as neat and substantial as that of the thirteenth volume of Iowa Reports; but the supreme court may increase the size of the volumes when necessary. Two volumes only shall be published in a year.

Sec. 157. The secretary of state shall take for the use of the state 500 copies of each volume of such Reports as soon as published, upon presentation of a certificate signed by a majority of the judges of the supreme court, showing that such volume is prepared and published as provided in this chapter; and shall execute a receipt therefor; upon presentation of which the auditor of state shall draw a warrant on the state treasury in payment for the same at the rate of five dollars per volume. None of said volumes shall be sold or disposed of before the same have been approved by the judges aforesaid.

Sec. 158. The copyright of all Reports prepared or published after the first day of January, A. D. 1875, shall be the property of the state. But the reporter shall own the copyright of all Reports published before that time, and the supreme court may order the publication of a new edition of any volume of which the copyright is owned by the reporter when the public interest requires it, and may require compliance therewith within six months by an order entered of record; and if the reporter neglects or refuses to comply with such order, then such copyright shall be forfeited to the state.

Sec. 159. The copies received by the secretary of state shall be disposed of by him as follows: Two copies of each volume to the library of congress and the library of the supreme court of the United States; one copy to the library of each state and territory in the United States, to each judge of the supreme, district, and circuit courts, to the clerk of the supreme court, and attorney general; fifty copies to the state library, to be and remain therein as a part thereof; and one copy to each county in the state; and twenty copies to the law department of the state university; and twenty copies to the state historical society for exchange in such manner as the proper officers thereof think advisable; and the remaining copies, together with all Reports now in the office of governor, secretary, auditor, treasurer of state, and register of the land-office, and superintendent of public instruction, shall be used by the trustees of the state library in exchange for such books on law or equity, or Reports of other states, as they may select. All books received by such exchange shall be deposited in and become a part of the state library.

Sec. 160. The reporter shall furnish reports to any person desiring the same, at a rate not exceeding five dollars for each volume. For a violation of this section, and upon conviction thereof, he shall be fined two hundred dollars.

(Act of 1880.)

CHAPTER 60.

SUPREME COURT REPORTS.

An act to provide for the stereotyping, publishing, and sale of the Supreme Court Reports, and to repeal sections 155, 156, 157, and 160, c. 4, tit. 3, of the Code, and to fix the salary of the supreme court reporter.

Be it enacted by the General Assembly of the State of Iowa:

Section 1. That within 60 days after sufficient opinions are announced to make a volume, as herein provided, the supreme court reporter shall furnish and deliver, at his office in Des Moines, Iowa, to the person, persons, or corporation having the contract with the state for publishing the same, copies of such opinions; and with each opinion a syllabus, a brief statement of the facts involved, and the legal propositions made by counsel in the argument, with the authorities cited. But the argument shall not be reported at length; and within 20 days after the proof-sheets for a volume are furnished to him by the publishers, at his office in Des Moines, Iowa, he shall furnish to said publishers an index and table of cases to such volume. The publishers shall furnish to the reporter, without delay, as soon as they shall be issued, two copies of the revised proof-sheets of the opinions, head-notes, indexes, and table of cases of each volume, for correction and approval by the judges of the supreme court, and shall cause such corrections to be made as shall be indicated thereon by said judges. Each of said volumes shall contain not less than 750 nor more than 800 pages, exclusive of table of cases and index, and the workmanship and quality of material shall in every particular be equal to the first issue of volume 40 of the Iowa Supreme Court Reports, and shall be approved and accepted by a majority of the judges of the supreme court.

Sec. 2. The copyrights of all the supreme court reports hereafter published shall vest in the secretary of state for the benefit of the people of this state; but this shall not be construed to prevent the contractor by whom any volume is published, his representatives, or assigns, from continuing the exclusive publication and sale of such volume so long as he or they shall, in all respects, comply with the requirements of this act in respect to the character, sale, and price of such volume.

Sec. 3. The supreme court reporter shall have no pecuniary interest in such reports, but the same shall be published under the contract to be entered into by the executive council with the person, persons, or corporation who

shall agree to publish and sell the same on the terms most advantageous to the people of this state, at a price not to exceed two dollars per volume of the size and quality as provided for in this act. And if any such volume shall, in any way, or from any cause, contain more than 800 pages, no increased or additional price shall be charged therefor.

Sec. 4. The executive council shall, commencing in the first week in April, A. D. 1880, and every eight years thereafter, advertise weekly in six different newspapers in different localities in this state, for the term of six weeks, that sealed proposals will be received at the office of the secretary of state for printing, publishing, and selling the said Reports for the term of eight years next after the first day of June of said year, at a certain rate per volume, to be stated in said proposal, not exceeding the maximum price fixed by this act, and in accordance with the provisions of this act.

Sec. 5. Each bidder shall deposit with the state treasurer the sum of \$1,000 before making his proposal, to be forfeited to the state in case he shall not make a contract according to his proposal if accepted, and according to the requirements of this act, and shall take a receipt from said treasurer, and deposit the same with his proposal, and upon entering into the contract herein provided, or upon the proposal being rejected, the said sum shall be returned.

Sec. 6. The successful bidder shall enter into a contract that he will publish the Supreme Court Reports of the state, of the quality, style, and character in all respects as set out in section 1 of this act; that he will publish and deliver to the secretary of state, at the capitol in Des Moines, 250 copies free of cost for publication or delivery, at the earliest practicable time, and within 60 days after the delivery of the manuscripts for any one copy of such Reports to the publishers; that he will stereotype the same, and at all times keep the same on sale in the state of Iowa to residents of this state for actual use at the contract price, in suitable quantities, in the city of Des Moines; that he will furnish the state any number of additional copies that may be required for its own use at the contract price, and procure new stereotype plates whenever the original plates shall become defaced or destroyed; and the said contract shall fully provide for the carrying into effect of all the provisions of this act, and shall be made within 30 days after he is notified of the acceptance of his proposal.

Sec. 7. The successful bidder shall, at the time of making his contract, execute and file with the treasurer of state a bond in the penal sum of \$10,000, conditioned to fulfill such contract in all particulars, with at least two sufficient sureties, residents of this state, to be approved by the executive council of the state. Such bond shall, by its terms, be the joint and several obligations of the persons executing it. If the successful bidder shall fail to complete his contract, or shall forfeit the same for any cause, the executive council shall relet the contract as soon thereafter as practicable, in the manner provided in this act: provided, however, that such bidder, in lieu of sureties to such bond, may deposit therewith bonds of the United States, payable to the bearer, amounting to not less than \$10,000.

Sec. 8. The contract of the successful bidder required by this act shall contain, among others, the following covenants on his part: *First.* That he will not take out in his own name, nor procure to be taken out in the name of any person other than the secretary of state of this state, a copyright upon any volume of the Supreme Court Reports published under such contract; and that, upon any breach of this covenant, he will pay to the treasurer of this state the sum of \$2,000 as liquidated damages. *Second.* That in case it shall be determined in any action upon the bond of such contractor that he has failed in any respect to comply with the provisions of this act or his contract, the executive council may declare the contract forfeited; and that, upon such forfeiture so declared, such contractor will, upon demand, transfer to the secretary of state of this state, for the use of the state, the stereotyped plates

of each volume of such Reports published under such contract, or, in default thereof, will pay to the treasurer of this state \$2,000 for each such volume, as liquidated damages for a failure to make such transfer; and such failure shall be deemed a breach of the conditions of such bond, and such liquidated damages may be recovered by action on such bond.

Sec. 9. The supreme court reporter shall receive as his compensation for all services up to the first day of July, 1880, such sums as shall be paid to him by the state under existing laws for the publication of the Supreme Court Reports up to and including volume 51. After the first day of July, 1880, the supreme court reporter shall receive an annual salary of \$2,000, payable quarterly, upon the certificate of the judges of said court that he has properly performed the duties of reporter, as required by this act.

Sec. 10. Sections 155, 156, 157, and 160, c. 4, tit. 3, of the Code, and all acts and parts of acts conflicting with the provisions of this act, are hereby repealed: provided, that the passage of this act shall not be construed to affect the publication of the Supreme Court Reports up to and including volume 51; but in all other respects the provisions of this act shall be in force from the time it takes effect, as hereinafter provided.

Sec. 11. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the *Iowa State Register* and the *Iowa State Leader*, newspapers published at Des Moines, Iowa, anything in section 33 of the Code to the contrary notwithstanding.

Approved March 18, 1880.

Cole, McVey & Clarke, for complainants.

Geo. B. Young and Henry J. Horn, for defendant West Pub. Co.

Wright, Cummins & Wright, for defendant G. B. Pray.

BREWER, J. The complainants insist that the state owns,—is the “proprietor,” within the meaning of the term as found in section 4952, Rev. St., of the opinions of its judges; that as proprietor it may take out a copyright in those opinions; that chapter 60, Laws 1880, provides for such copyright; and that the contract transfers the benefit thereof to complainants. They further insist that if not within the scope of the act of congress, the state has a common-law property right in the opinions of its judges; that it can determine how they shall be published; and that having contracted with complainants for exclusive publication, the courts should protect them in the enjoyment of this property right. The defendant insists that there is no such thing as a copyright or other property right in the opinions of the judges; deny that the state ever contemplated claiming or contracting for any exclusive right of publication of the opinions; and claim, further, that if complainants ever had any rights, their laches have been such as to prevent the interference of a court of equity. Obviously, these cross-contentions present three important questions: *First*. The nature and extent of the rights of a state in the opinions of its judges. *Second*. What has the state by its legislation asserted, and what by its contract did it transfer to the complainants? *Third*. To what extent are complainants, by their conduct, estopped from the remedy sought?

1. Has the state, either by virtue of the common law or the copyright acts of congress, any property right in the opinions of the judges of

the supreme court? If this question was submitted to me as a new question independent of prior adjudications, I should unhesitatingly answer it in the negative. If such right exists, it carries with it the right of withholding publication. But it is a maxim of universal application that every man is presumed to know the law, and it would seem inherent that freedom of access to the laws, or the official interpretation of those laws, should be co-extensive with the sweep of the maxim. Knowledge is the only just condition of obedience. The laws of Rome were written on tablets and posted, that all might read, and all were bound to obedience. The act of that emperor who caused his enactments to be written in small letters, on small tablets, and then posted the latter at such height that none could read the letters, and at the same time insisted upon the rule of obedience, outraging as it did the relations of governor and governed under his own system of government, has never been deemed consistent with or possible under ours. This claim seems to rest upon the idea that the state, as an entity independent of its citizens, or as a whole combined of all its individuals, has a property right in the laws and judicial opinions outside of and beyond that vested separately in each citizen. I conceive this to be an error. Each citizen is a ruler,—a law-maker,—and as such has the right of access to the laws he joins in making and to any official interpretation thereof. If the right of property enters into the question, he is a part owner, and as such cannot be deprived of equal access by his co-owners. Could a majority of a legislative assembly debar the minority from participation in the deliberations or a knowledge of the action of the assembly? The majority may bind the minority to the action it determines, but cannot withhold knowledge thereof. So, the majority of the citizens of a state—in a larger sense, the law-makers—may determine the conduct of all; but can knowledge of what is determined be withheld. This, of course, is more emphatically true as to the statutes, but also true as to judicial opinions, which, though not laws, are official interpretations of law. The mere judgment for or against the plaintiff of course decides the case; but that often furnishes little insight into the questions considered and determined. The opinions, at least those of the highest tribunal, are always considered as official interpretations of law, both statute and common, and as such binding upon all citizens. The same argument which supports the state's claim of property in judicial opinions supports that of property in statutes. The state pays the judges, and therefore owns the product of their official toil. The same is true as to legislators. But though such would be my views in the absence of prior adjudications, I find that the English courts generally sustain the crown's proprietary rights in judicial opinions.

The first case in the order of time was that of *Atkins v. Stationers' Co.*, decided in the eighteenth year of Charles II., being the year 1666. Atkins, having a patent from the crown, claimed the exclusive right to print law books. The defendants had printed Rolles' Abridg-

ment. A bill was brought by the plaintiff asking an injunction, which the lord chancellor granted. The case was appealed to the house of lords. It was there argued that law reports were the king's property because he pays the judges who pronounce the law. The house of lords took this view of the case, and affirmed the decree below. The case will be found reported in Carter's Report, page 89. On page 91 of the opinion it is said: "The salaries of the judges are paid by the king, and the reporters in all courts at Westminster were paid by the king formerly."

The next case was that of *Roper v. Streator*, decided in the year 1672, cited at length in 6 Bac. Abr. 507, and in 10 Mod. 106, and in 2 Show. 260. Roper purchased of the executors of Croke a third part of his reports. Defendant, Streator, had a patent or copyright from the king, and printed these reports. Roper brought action against the defendant for wrongfully printing the reports. Defendant, Streator, pleaded the king's grant as an owner of the copyright, the question being whether the king or Croke was the owner of the reports. The case was decided in the court of king's bench in favor of the plaintiff, and appeal was taken to the house of lords, and the judgment of the king's bench was reversed, upon the ground that the king was the owner of the copyright, and that the executors of the author of the reports could convey nothing. See 4 Burr. 2316; 6 Bac. Abr. 507.

In the case of *Company of Stationers v. Parker*, reported in Skinner's Reports, 233, Holt, who argued the case for defendant, said, on page 236, that he agreed that the king had power to grant the printing of books concerning religion and law.

In the case of *Basket v. University of Cambridge*, reported in 1 W. Bl. 105, and decided in the year 1758, the court of king's bench held that the right to print the acts of parliament belonged to the king. HALE, C. J., in deciding the case, said: "So the year-books, taken at the expense of the crown, gave the king the property by purchase." The chief justice in this case gives the history of the king's right to print and publish certain books at great length, and says: "The king claimed copyrights of acts of parliament before the grant of Henry VIII., and the copyright of the king was still asserted as well to books of religion as acts of parliament;" and in conclusion, on this subject, the lord chief justice says: "The crown, therefore, has no prerogative at common law over the art of printing, but is merely entitled to especial copyrights."

In the case of *Eyre v. Carnan*, decided in 1781, and reported in 5 Bac. Abr. 509, the lord chief baron says: "In the case of *Basket v. University of Cambridge* it was held that the right of printing acts of parliament rests in the king."

In the case of *Millar v. Taylor*, 4 Burr. 2305, the copyright of the king to all reports and acts of parliament was fully affirmed by Lord MANSFIELD in a very elaborate and able opinion.

Shortt, in the Law of Copyright, on page 36, states that the ex-

clusive right was vested in the king to print the reports of judicial proceedings, statutes, orders of the privy council, translation of the Bible, etc. He further says that the claim of the crown to this copy-right has by some been based upon the right of property, by others on naked prerogative; by others on the ground that the expense of the publication is borne by the crown; as to the Bible, that the sovereign is the head of the church. Some of the decisions place the right upon the crown, that the crown is bound to see that correct copies of the Bible, laws, and judicial opinions are furnished the people. Others that the crown pays the judges who pronounce the opinions. Blackstone rests the right on grounds of political and public convenience. The king, he says, as executive magistrate, possesses the right of promulgating to the people the acts of state and government. See 2 Bl. Comm. 410.

In view of this consensus of opinion on the other side of the waters, of the fact that the common law is in force in this country so far as compatible with our system of government and the condition and wants of society, and that a mere change in the locus of the governing power from the crown to the people ought not to work material change in the extent of that power, it may be that due regard for settled law forbids a decision in accord with the views I have expressed.

It is worthy of remark, however, that on this side of the waters the proprietary right of the state in statutes or judicial opinions has never been affirmed, unless in a late case in the supreme court of errors of Connecticut. In it the court says: "The judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright." On the other hand, in the case of *Davidson v. Wheelock*, *post*, 61, decided in this district in 1866 by Judge NELSON, the court refused an injunction to restrain the publication of the constitution and the laws of Minnesota as revised and re-enacted by the legislature. In the course of his opinion the learned judge uses this language: "It is true that such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him." When we bear in mind the fact that for years law magazines have been constantly printing in advance of official reports opinions of the various courts, the silence of judicial decision is significant of a doubt, at least, whether the doctrine as recognized in England obtains under our system of government.

But I forbear further comment upon this question, and pass to the second.

The contract must be interpreted by the legislation of the state. Nothing passed to complainants save as authorized by statute; and to determine the scope of the act under which this contract was made

we must construe it in connection with other legislation *in pari materia*. The Laws of 1873 prescribed the duties of the clerk of the supreme court, and also provided for the publication of the reports. They directed the clerk to record all opinions as soon as filed, (section 149, c. 2, tit. 3, Code Iowa 1873;) required him to permit any one to take a copy; and to himself make and certify a copy when requested, (section 147, Id.) No larger liberty of access could well be given,—no clearer expression of the intent of the legislature to make the opinions free to all. At the same time those laws provided for the publication of the reports and vested the copyright thereof in the state. Section 158, c. 4, Id. The publication was given to the reporter, and the contents of each volume were prescribed. In addition to the opinions, he was to prepare and include *syllabi*, abstracts of the facts and law questions in each case, table of cases, and index. Sections 155, 156, c. 4, Id. It was this completed volume which was to be copyrighted, a part of its contents being the official interpretations of law by the judges, and the balance mere matters of convenience to the public prepared by the reporter. Construing these different portions of the same statute together, could it be seriously contended that the copyright of the reports nullified or limited the general and unrestricted access to the opinions? Is not the only fair construction that the opinions were to be free to all, and the security of the copyright only cast upon the completed volume? Such would be the construction, under any circumstances; and especially when, as in this case, the matter declared free is the official interpretation of laws,—matter the most general knowledge of which is of vital importance.

Now, the act of 1880 makes no change in the duties of the clerk, repeals no section giving freedom of access to the opinions, and only changes the manner of publishing the Reports. Instead of leaving it with the reporter, it is done by contract. If the opinions were free before, they still are. There is nothing in the act which either directly or by implication asserts on the part of the state a broader or more extensive copyright, or purports to give to the contractor any other rights than were claimed for the state by the Statutes of 1873. How, then, can complainants claim the exclusive right to the publication of the opinions separately? I think the state has made them the common property of all. I indorse fully the language of the learned district judge of the Southern district of Ohio in the case of *Banks v. Manchester*, reported in 23 Fed. Rep. 143, and think it pertinent to the case at bar:

"It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them, and such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication.

It protects only the work of the reporter; that is to say, the indexes, the tables of cases, and the statement of points made and the authorities cited by counsel. *Wheaton v. Peters*, 8 Pet. 653; *Little v. Gould*, 2 Blatchf. 165, 362; *Chase v. Sanborn*, 4 Clif. 306; *Myers v. Callaghan*, 5 Fed. Rep. 726; S. C. 10 Biss. 139; *Myers v. Callaghan*, 20 Fed. Rep. 441."

The conclusion to which I have come upon this second question avoids the necessity of considering the third question.

The application for an injunction will be denied.

DAVIDSON and another v. WHEELOCK and others.¹

(Circuit Court, D. Minnesota. May 26, 1866.)

COPYRIGHT—STATE STATUTES—RIGHT OF COMPILER—LEGISLATIVE POWER OF STATE.

While a compilation of the statutes of a state may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis, he cannot obtain a copyright for the publication of the laws alone, nor can the legislature of the state confer any such exclusive privilege upon him.

In Equity. Motion for provisional injunction.

Allis & Williams, for complainants.

Bigelow & Clark, for defendants.

NELSON, J. Complainants file their bill of complaint and ask for an injunction to restrain the defendants from publishing and exposing for sale and selling two books, the one entitled "General Statutes of the State of Minnesota, prepared by the Commissioners appointed to revise the Statutes of the State by Act of the Legislature passed February 17, 1863," and the other entitled "Appendix to Report of the Commissioners of Revision, embracing the Amendments to the same adopted by the Legislature." The arguments urged by counsel for an injunction embrace no facts not fully set forth in the bill of complaint, and the truth of the matters contained in the affidavit read by counsel for the defendants in opposition to the motion seem to be admitted. The whole question depends upon the construction to be given to the acts of the legislature of the state of Minnesota approved March 1, 1866, providing for the printing, binding, editing, and publishing the General Statutes of said state. One of these acts provides for the letting to the lowest bidder of the contract to print and bind the statutes, specifying the kind of type and paper to be used, and embracing all the details necessary to secure a faithful performance on the part of the contractor; and, as an inducement for securing a low rate per copy

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

The opinion of Judge NELSON, referred to by Judge BREWER, in *Banks v. West Pub. Co.*, ante, 50, is here reported for the first time.

for printing and binding, the fourth section provides that the copyright of said General Statutes shall be awarded to the person or firm offering to furnish the said General Statutes required by the act at the lowest price per copy. The other act appoints a commissioner to edit and superintend the printing and publication of the General Statutes of the state, and provides for the manner in which he shall prepare and furnish the manuscript for the printer and publisher, requiring him to furnish head and marginal notes and references to decisions of the supreme court of the state, affecting any of the sections of the statutes, and to prepare an exact and copious index to the whole. When published, he shall append his certificate that the same are correct transcripts of the laws on file in the office of the secretary of state.

The complainants, it appears, were the successful bidders, and the copyright of the General Statutes was awarded them.

Now, what is the exclusive right which the complainants are entitled to under the acts of the legislature of the state of Minnesota above referred to? Clearly, to print, publish, and sell the General Statutes of the state of Minnesota, as edited and prepared by the commissioner named by the legislature, containing his head and marginal notes, and his references. They obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any number of legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection by every one, under such rules and regulations as will secure their preservation. They may be digested or compiled by any one, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.

An examination of the book and pamphlet published by the defendants shows that they neither contain, nor purport to, any of the marginal notes or references contemplated by the acts of the legislature, and no materials which would be embraced in the book to be published by complainants under the supervision of the commissioner, with the exception of the laws of the state. In my opinion, therefore, upon the facts set forth in the bill, the complainants are not entitled to a provisional injunction.

Motion denied.

LOCKWOOD v. FABER.¹*(Circuit Court, S. D. New York. February 5, 1886.)*

1. PATENTS FOR INVENTIONS—LOCKWOOD PATENT.

In this case, on motion for preliminary injunction, under the patent to Rhodes Lockwood, sustained in *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724, *Lockwood v. Cleveland*, 18 Fed. Rep. 37, and *Lockwood v. Hooper*, 25 Fed. Rep. 910, the point was raised, for the first time, that there was not a sufficient description of the invention within the meaning of the statute, and the motion was denied.

2. SAME—DESCRIPTION OF AN INVENTION.

A description of an invention does not comply with the statute when those skilled in the art to which the invention belongs can only ascertain by experiment how to practice it.

3. DEFENSES ON APPLICATION FOR PRELIMINARY INJUNCTION.

Where the defense of prior public use was much more strongly fortified by corroborative evidence than in prior cases, where this defense had been made and overruled, a motion for a preliminary injunction was denied.

In Equity.

WALLACE, J. The case, as it appears upon this motion, is not sufficiently clear for the complainant to entitle him to a preliminary injunction.

1. Doubts are suggested as to the validity of the patent upon a point which apparently was not considered in the case of *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724, at final hearing, or in the case of *Lockwood v. Hooper*, 25 Fed. Rep. 910, upon motion for an injunction. The patent is for a new article of manufacture, when produced by a specified process or method,—“a rubber eraser, having the soft finished erasive surfaces produced by tumbling the erasers.” It was not new to produce the article by grinding the surfaces, or filing them; nor was it new to treat small articles of India rubber by tumbling them in a barrel or revolving box long enough to give them a smooth, soft exterior surface; and the only novelty of the invention consists in producing the article by the method of the patent. The only description of the process contained in the specification is that the pieces of rubber are “tumbled (in a barrel or revolving box) until, by their action, one on the other, the corners and edges are worn away or rounded, leaving each eraser with a soft, velvet-like finish over its entire surface.” If those skilled in the art can only ascertain by experiment how long, or under what conditions, the operation must be carried on to produce the new result, which is the essence of the invention, it is doubted whether such a description complies with the statute. *Tyler v. Boston*, 7 Wall. 327. On the other hand, if they can produce the article without such information, where is the novelty of the invention?

2. The defense of prior public use, as now presented, is a very

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

formidable one. It is alleged that many manufacturers made and sold the patented article more than two years prior to the application for the patent. Although the defense as to the prior use and sale by some of these manufacturers was considered and overruled in the case of *Lockwood v. Cutter Tower Co.*, and by other manufacturers was urged ineffectually upon the motion for the injunction in the case of *Lockwood v. Hooper*, the defense, as now presented, is much more strongly fortified than before by corroborative evidence; and it is reasonable to assume that a different result would have been reached if the evidence had been introduced which is now produced.

The motion is denied.

MONTROSS and others v. BULLARD and others.¹

(Circuit Court, N. D. Illinois. March 23, 1886.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION—INFRINGEMENT.

Letters patent No. 154,848, of December 8, 1874, to William H. Curtis, for an improvement in carpet stretchers, must, in view of prior patents for carpet stretchers, acting upon the same principle, be limited to the special devices therein shown, and cannot be construed so as to include other machines which are mere adaptations or simplifications of other older devices.

2. SAME—CARPET STRETCHER.

A carpet stretcher manufactured under the patent to Frederick J. Hubbard, of May 20, 1884, is a new improvement on older devices, and does not embody the special devices of the Curtis patent.

3. SAME—CHANGE IN SIZE OF MACHINE.

A mere change in the size of a machine, (a carpet stretcher,) whereby it is reduced from a large and clumsy device to a light, portable, and convenient one, while its mode of operation is not changed, is not a patentable change.

In Equity.

Jesse Cox, for complainants.

Coburn & Thacher, for defendants.

BLODGETT, J. The bill in this case charges an infringement by defendants of patent No. 154,848, granted December 8, 1874, to William H. Curtis, for "an improvement in carpet stretchers," for which they seek an injunction and accounting. No dispute is made as to the defendants' title. The defenses are (1) that complainants' patent is void for want of novelty; (2) that defendants do not infringe.

The proof shows that carpet stretching devices are old. The defendants have put into the record the following patents for carpet stretchers: No. 10,143, granted December 18, 1853, to J. W. Weatherby; No. 22,930, granted February 15, 1859, to J. W. Bragg:

¹Reported by Charles C. Linthicum, Esq., of the Chicago bar.

No. 36,187, granted August 12, 1862, to E. Wood; No. 70,032, granted October 22, 1867, to W. H. Robinson; No. 67,690, granted August 19, 1867, to J. P. Warner; No. 85,690, granted August 5, 1869, to S. Pennock; No. 83,741, granted November 3, 1878, to E. P. Shaffer; No. 114,418, granted August 5, 1873, to W. H. Boles; besides several others, which it is unnecessary to enumerate. All the devices shown in these patents operate upon substantially the same principle; that is, they have a head, provided with teeth or claws to engage with the carpet, and some device for pushing or pulling this head so as to stretch the carpet, and most of them show a pawl, or some other device, to hold what is gained by each pull or push. The earlier devices seem to have been large and clumsy. Some of them were evidently intended to reach across the room, so that one part could brace against the base-board of one side of the room, while the head pushed or pulled the edge of the carpet to the opposite base-board, where it could be tacked or fastened. The machine made under complainants' patent, and also defendants' machines, are made very light and portable, and are an undoubted convenience to the person who has to use them, and an obvious advantage to the peddlers, who can much more readily hawk them from house to house; but a change in the size of the machine, making it larger or smaller, while its mode of operation is not changed, is not a patentable change; and, besides that, there is nothing in the complainants' patent as to the size of the machines to be made under it, and the complainants have a right to make a machine just as large or just as small as they choose under the specifications of this patent.

Complainants' patent provides for the construction of a machine with a head, on the under side of which are teeth to seize or engage with the carpet, and a bar with a hook at one end, to be driven into the floor near the base-board, and a ratchet upon the top of this bar. Upon the head are two bales, one of which is to act as a pawl, and engage with the ratchet as the head is drawn forward; and to the other pawl, which is larger, is pivoted a lever, the lower end of which, working in the notches of the ratchet bar, enables the operator, by the use of the lever, to draw the head towards the hook end of the ratcheted bar, while the pawl holds what is gained by each throw of the lever. Defendants' machine is manufactured under a patent granted May 20, 1884, to Frederick J. Hubbard. It contains, as does the complainants', a toothed head to engage with the carpet; and a device, by means of an extension bar and lever working in a ratchet plate, to pull the carpet to place, and also a catch to hold what is gained by each throw of the lever. Its construction and mode of operation are much like Fig. 2 of the Stevenson patent of November 18, 1868. It is also similar in construction and mode of operation to the Boles patent of August 5, 1873, especially in the form of construction shown in Fig. 3 of that patent. Both the Stevenson and Boles devices show an extension bar with ratchet and levers, and

with paws to hold all that is gained by each throw of the levers. The still older devices of Weatherby and Wood also show extension bars and ratchets worked with a cog-wheel or lever.

With the number of devices for carpet stretchers shown in the proof, all acting upon substantially the same principle, I think there can be no doubt that the patent-office, in granting the patent to the complainants, intended to only grant it for the special devices shown; and although several of the older patents have a working mechanism very much like complainants', it is possible complainants' patent can be upheld so far as to protect the special device shown, but it cannot be so construed as to include other machines which are mere adaptations or simplifications of other older devices, and I have no doubt from the proof that defendants' machine is, in its construction and mode of operation, an improvement upon the Stevenson and Boles machines, and that its construction does not embody the special devices of complainants' patent.

The finding is that the defendants do not infringe, and the bill is dismissed for want of equity.

THAYER v. SPAULDING.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—BASE-BALL MASKS—FENCING MASKS—ANTICIPATION.

Letters patent No. 200,358, of February 12, 1878, to Frederick W. Thayer, for an improvement in masks, is not anticipated by the old fencing mask, as the fencing mask had no forehead or chin rest, such as are specified in the Thayer patent.

2. SAME—PATENTABILITY.

Although the patented mask and the old fencing mask are in some respects analogous in their use, *held*, that there was enough difference to make the former patentable over the latter.

3. SAME—INFRINGEMENT.

As patentee appeared, from the evidence, to be the first in the art to show a mask to protect the face having a rest for the forehead, *held*, that he was entitled to cover such forehead-rest broadly, and was not limited to the special means by which he affixed it to the wires of the cage.

4. SAME—PRIOR USE—EVIDENCE TO ESTABLISH.

A party asserting a prior use of a device covered by a patent has the burden of proof, and is bound to establish such prior use by strong and convincing if not absolutely conclusive proof.

In Equity.

Coburn & Thacher, for complainants.

West & Bond, for defendants.

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

BLODGETT, J. The defendants in this case are charged with the infringement of patent No. 200,358, granted February 12, 1878, to F. W. Thayer for "an improvement in masks," and an injunction and an accounting asked. The purpose and description of the device, as stated by the inventor himself in his specifications, are:

"It is intended to protect the face of a player from being hit or injured by a base ball while in flight towards him, and also, at the same time, to not materially obstruct his sight. It is usually to be worn by the catcher, or person in rear of the striker or bat wielder. It consists of a forehead and chin rest, or bottom bearing, and a wire cage to receive them, and extend about the face, * * * and provided with straps, or means of securing the cage to the head of the player."

The patent has two claims:

"(1) The face-guard or safety mask, substantially as described, for the purpose specified, it consisting of the open cage and forehead and chin-rests or bearings,—all combined and arranged essentially as set forth. (2) The open cage provided with the forehead-rest, arranged in it substantially as represented."

The defenses are (1) that the claims of the patent are limited to rests supported by wires reaching from the pads to the wires of the frame, and that under this construction the defendants do not infringe; (2) that the device is nothing but the old fencing mask; (3) that the defendants do not infringe; (4) prior public use of the device for more than two years.

The patent contains a disclaimer of the old and well-known fencing mask, as it is called, worn by persons while fencing, or playing with foils or the small-sword. The defendants make and sell a face mask formed of a wire cage and frame, in the same manner as the complainant's, and containing a head-rest, and chin-rest; but their head-rest, instead of being supported by horizontal wires extending from the frame to the head-pad, is supported by straps reaching from the side wires across the frame, so as to bear against the forehead. The old fencing mask offered in evidence shows no head-rest, and, as Thayer seems to have been, from the evidence, the first in the art to show a rest for the forehead in a mask intended to protect the face, it seems to me that he had a right to cover, and does cover, his patent, the forehead rest, broadly, and not the special means by which he fixed it to the wires of the cage.

What I have said about the forehead-rest of the two devices will apply to the chin-rest. Thayer's chin-rest is supported in place by bracing wires, attached to the front wire or frame of the cage; while the defendants' is supported by being attached to the side wire. But, as both the defendants' head and chin rests perform the same function as that performed by the same elements in the patent, and no other, they must be treated as equivalents for the rests covered by the patent.

As to the second point made, that this device is nothing but the old fencing mask, there seems to be a patentable difference between the

two devices, in the use to which they were to be applied, and also in the elements of which they were necessarily composed. The fencing mask required no head-rest, and no such chin-rest as was required for a base-ball mask. In some respects it may be said that the devices are analogous in their use, but there seems to me to be enough difference between them to make that difference patentable. The first claim of the patent is for the combination of the face-guard, and the forehead and chin rests; and the second claim is for the open cage provided with a forehead-rest. The fencing mask did not show these rests in any form, and they were not required for that purpose.

It is urged that the fencing mask shows a chin-rest, but it is in fact a mere pad evidently to prevent abrasion of the chin by the wire frame. The chin-rest in a base-ball mask, being liable to receive heavy blows, performs a more important function. A comparison of the two masks satisfies me that the defendants' mask contains the elements of both the claims of the complainant's mask,—the cage, and the chin and forehead rests,—and I have no doubt but that the idea of the defendants' device is all found in the Thayer patent.

As to prior use, the testimony is conflicting. Two witnesses, McVey and A. G. Spaulding, testify to having seen a base-ball mask worn at a match game, played in Boston, in the fall of 1875; while the testimony on the part of the complainant contradicts this testimony so fully and explicitly that I cannot but conclude that Mr. Spaulding and Mr. McVey are mistaken as to the time when they saw Tyng wear this mask. The testimony of a number of persons is taken, who were present at the game referred to by Spaulding and McVey, and who all concur in saying that no such mask was worn at that game. Parties asserting a prior use of a device covered by a patent have the burden of proof, and are bound to establish such prior use by strong and convincing if not absolutely conclusive proof; and I feel compelled to say, after considering the proof on both sides in reference to this prior use, that I do not think that even the preponderance is with the defendants.

The finding will therefore be that the patent is valid, that the defendants infringe, and that the complainants are entitled to damages.

SMITH and others v. MURRAY and others.¹*(Circuit Court, N. D. Illinois. March 22, 1886.)*

1. PATENTS FOR INVENTIONS—DESCRIPTION OF THE INVENTION.

The specification of letters patent No. 206,930, of August 13, 1878, to William P. Clotworthy, for a baking powder, described as one of the ingredients "ammoniated potash alum," but the claim was for "a compound of exsiccated ammonia alum," etc. The proof showed there was no such article known to commerce or chemistry as "ammoniated potash alum." It was contended that the claim, when standing alone, was a sufficient "description" of the compound to comply with the statute. *Held*, that it was a matter of grave doubt whether the "claim" was to be considered as the "description" required by law, because the statute speaks of the "description and claim," and the office of the claim is merely to point out what is claimed as the invention.

2. SAME.

But the claim being repugnant to the specification, *held*, that the whole invention must be found in the one or in the other, and that the two, taken together, were so contradictory as to render the patent void for uncertainty.

3. SAME—PATENTABILITY.

It being known to the art that the burning or drying of the alum used as an ingredient of baking powder made it keep better, there was nothing patentable in the discovery that drying the alum so that all the water was expelled would make a baking powder which would keep longer than if a part of the water had not been expelled.

4. SAME—INFRINGEMENT.

As the defendants did not use the entire formula of the patent, but used an additional ingredient producing another result, *held*, that they did not infringe.

In Equity.

Coburn & Thacher, for complainants.

Munday, Evarts & Adcock, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of letters patent No. 206,930, granted August 13, 1878, to William P. Clotworthy for "an improvement in baking powders."

In explaining the scope and purpose of his patent, the patentee says in his specifications:

"This invention relates to that class of compounds known as 'baking powders,' and used as a substitute for yeast to lighten the various preparations of flour and meal in the processes by which they are transformed by the culinary art into bread, rolls, pan-cakes, and other articles of food; and it consists in the chemical adjustment of ammoniated potash alum, from which the water of crystallization has been expelled, by exsiccation, with bicarbonate of soda, or other alkaline carbonate, and starch, in such proportions as to retain the carbonic acid gas until the application of heat in the process of baking commences. To prepare the baking powder, take a given quantity of ammoniated potash alum, and burn or calcine the same until the water of crystallization is expelled therefrom, and it loses from forty-three to forty-eight per centum of its weight. This leaves a residue friable, nearly tasteless, and almost insoluble in cold water, but readily soluble in warm water. Add to this exsiccated alum an equal portion, by weight, of bicarbonate of soda or other alka-

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

line carbonate, and a double proportion of powdered corn-starch. Mix all of these ingredients well together, and the composition is ready for use."

The patent has but one claim, which is as follows: "As a baking powder, a compound composed of exsiccated ammonia alum, bicarbonate of soda, and corn-starch, substantially in the proportion and for the purposes specified."

The defenses interposed are (1) that the patent is void for uncertainty; (2) that the compound, substantially as covered by the claim, had been in public use in this country for more than two years prior to the application for this patent; (3) that the defendants do not infringe.

As to the first point. The patent law (section 4888, Rev. St.) requires that the inventor shall file in the patent-office a written description of his patent, and the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same. It will be noticed that in describing his compound this patentee states, "It consists in the chemical adjustment of ammoniated potash alum;" and in his directions how to compound the parts, he says: "Take a given quantity of ammoniated potash alum, and burn or calcine the same until the water of crystallization is expelled therefrom." He further says that he adds to this exsiccated ammoniated potash alum a certain proportion of bicarbonate of soda, and a certain proportion of powdered corn-starch. When we come to examine his claim, we find nothing said about "ammoniated potash alum;" but the claim is "for a compound composed of exsiccated ammonia alum," etc. The proof shows that there is no such article known to commerce or chemistry as "ammoniated potash alum," and the contention is that this patent is void for uncertainty, because the claim does not cover anything which is covered or described in the specifications.

It was contended upon the hearing that the claim, when standing alone, was a sufficient description of the compound to enable any person skilled in the art to make the baking powder which the patentee intended to cover. I very much doubt, however, whether the "claim" is to be treated or considered as the "description" of the patent required by law to be filed in the patent-office, because the statute speaks of the "description and claim," and the office of the claim is merely to point out what he claims as his invention or discovery. But, waiving that question, it seems to me that as the specifications and claim of this patent are repugnant to each other, we must either find the whole invention in the specifications or in the claim, and cannot take a part of the specifications to help out the claim, and reject the rest, and, if we do, either the whole patent must be found in the specifications or in the claim. If you treat the specifications as any part of the patent, then it becomes contradictory.

In one part of it you are told to compound "ammoniated potash alum" with the other two ingredients; and in the other, you are told to compound "exsiccated ammonia alum;" and there is nothing in the instrument to show which of these the patentee really intended to use. Ammonia alum not being referred to in the specifications as the article to be compounded with soda and starch, no one can say with certainty in what proportions the patentee intended to compound them, because the fact that he directed the compounding of certain proportions of "ammoniated potash alum" with certain proportions of soda and starch is no evidence that he intended to make a baking powder by compounding the same proportions of starch and soda with "exsiccated ammonia alum."

But if I am wrong in my conclusion that this patent is void by reason of the uncertainty referred to, and if the term "ammonia alum" in the claim controls and modifies the formula in the specifications, still I think there is a complete defense upon the facts in the case. Conceding for the argument that the direction is to use exsiccated ammonia alum, the proof satisfied me that the only object in burning or drying the alum is that a baking powder made of dried or exsiccated alum will keep longer than such a compound made from the raw alum crystals, which carry from 47 to 49 per cent. of water of crystallization. In the United States Dispensatory, introduced upon the hearing, (Ed. 1884,) under title "*Alumina Exsiccata*," page 164, after giving the directions for burning or drying alum, in which it is said the heat must not be raised beyond the temperature of 400 degrees Fahrenheit, it is stated: "The object of this process is to obtain the alum free from the water of crystallization, without otherwise in the least decomposing it."

Now, there can be no doubt from the proof that M. A. Christian began the manufacture of baking powders in the fall of 1874, in which he used burnt alum as the sole acid ingredient, using bicarbonate of soda and bran-dust or starch as the other ingredients, and that he continued such manufacture up to the time his testimony was taken in this case, having begun at Granby, Missouri, in November, 1874; moved from there to Fort Scott, Kansas, in February, 1875, and from there to St. Louis, Missouri, in August, 1876; and that he has been quite a large manufacturer during all that time, and that powders so made by him and his firm with burnt alum as the only acid constituent have been extensively sold through the state of Missouri and adjacent states since February, 1875. It is urged that, from his description of his apparatus for burning his alum, he could not have burned it so as to expel all the water, but his testimony shows that little, if any, fault was found with his goods on the ground that the powders did not keep well, and he seems to have learned, soon after he commenced the business, that the better and more thoroughly he burnt his alum the better his baking powder kept. The acid ingredient, which is needed to combine with the soda in order to evolve carbonic

acid gas which leavens the bread, is as effective in unburnt or slightly burnt as in the thoroughly burnt alum. In fact, the only purpose of burning it is to expel so much of the water that the starch or other dryer used will keep the compound, so that the gas will not be evolved until the powder is used, and this depends evidently, to some extent, upon the quantity of starch or bran-dust used, because a large proportion of starch will absorb and hold more moisture than a small quantity, as that is the sole office of the starch or a similar ingredient. That is, if all the water of crystallization is expelled, no more effective baking powder is made; but you do get one that will keep in stock and retain its properties longer, the degree of dryness having no other effect on the powder than to improve its keeping qualities; so that the degree of dryness of the alum baking powder depends on the dryness to which the alum is burned. Burning, then, is only a question of degree, for a single purpose, and, Christian having learned soon after he began the manufacture that the keeping qualities of his goods depended upon the thoroughness of his burning, the mere fact that Clotworthy learned by his experiments that the best alum baking powder was made by burning or drying the alum until all the water is expelled, was no patentable discovery, when others had learned that the dryer the alum was made the longer the powder would keep. It therefore seems to me that, after what Christian did, there was nothing for Clotworthy to invent. It was a mere question of a better manufacture by taking more pains with the preparation of the ingredients, and a housekeeper might as well claim a patent for more thoroughly kneading her dough than was done by her neighbors, because she had found the more she kneaded the dough the better her bread became. It being known to the art that some burning or drying of alum made the baking powder keep better, there was nothing patentable in drying it so as to expel all the water, and make it keep longer than if the water had not all been expelled.

Then, too, the proof shows that the defendants' baking powders are not made upon the formula of complainants' patent, if it can be said to contain a formula, but that the defendants use a percentage of acid phosphate in all their powders. It is true that the learned chemist who analyzed defendants' powders, and testified as a chemical expert in this case, testified that the acid phosphate is the equivalent of so much alum, and performs no other office in the compound than the same quantity of alum; but this line of argument would prohibit the use of all or part acid phosphate, cream of tartar, or tartaric acid, or any other acid, because they are the acid equivalents of the alum. The sole function of the acid ingredient is to combine with the alkali and evolve carbonic gas, for it is the carbonic acid gas that is needed to leaven the dough. The proof shows that other acids were used for this purpose long before Clotworthy's experiments began; in fact, proof would hardly be necessary upon a matter so completely within the realm of common knowledge. The proof also shows the further

fact that the defendants use acid phosphates because the alum alone makes the bread bitter.

If, therefore, this patent can be sustained at all, it must be for the specific compound of matter disclosed by it; and, as the defendants do not use the entire combination, but use another ingredient producing another result, they do not infringe. And, further, if this patent requires, as was urged upon the argument, that all the water of crystallization shall be expelled from the alum by burning or calcining, and if Christian did not practice the invention because he did not expel *all* the water, then the complainants fail in their proof in this case, because they do not show how much of the water the defendants expel.

The finding is therefore that the patent is void, and that the defendants do not infringe, and the bill is dismissed for want of equity.

BROWN & VAN ARSDALE MANUF'G CO. v. STUDEBAKER BROS.
MANUF'G CO.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—AXLE SKEINS FOR VEHICLES.

Letters patent No. 216,615, of June 17, 1879, to N. L. Holmes, for an improvement in axle skeins for vehicles, must, in view of the prior state of the art, be limited strictly to its special device, which is the cutting of the blank in such shape as that, when formed up, it will make two frustrums of cones, the small end of the larger one springing from the large end of the smaller one, or the skein itself.

2. SAME.

The fifth and eighth claims of this patent cannot be sustained in view of the state of the art; and there was no infringement of the first and third claims in this case.

In Equity.

Munday, Evarts & Adcock, for complainant.

Coburn & Thacher, for defendant.

BLODGETT, J. The bill in this case seeks an injunction and accounting for the alleged infringement of patent No. 216,615, granted June 17, 1879, to N. L. Holmes, for "an improvement in axle skeins for vehicles." The patentee says in his specifications:

"My invention relates to the class of thimble skeins in which the thimble is formed up of sheet steel, and consists in a novel form of blank which furnishes both upper and lower wrist extension, continuous with the spindle portion, and which brings the seam or weld of the meeting edges in the spindle on one side of the latter instead of on the top as heretofore. It also consists in making the upper and lower extensions of such width and form as nearly or quite to envelope or embrace the axle back of the spindle; such

¹Reported by Charles C. Linthicum, Esq., of the Chicago bar.

complete wrist having lateral joints only, so that the clip applied thereto, after the thimble has been forced upon the axle, will more easily bind the wrist to the axle. * * * The object of my invention is to give greater strength to the skein, to the attachment of the skein to the axle, and to the axle at the inner point of attachment, and also to obviate special objections to a seam or weld situated on the top of the spindle."

The patent contains nine claims, but only the first, third, fifth, and eighth are alleged to be infringed. These claims are as follows:

(1) The blank for a thimble skein, having wings to form upper and lower wrist extensions continuous with the spindle portion, substantially as described.

(3) A thimble skein formed from sheet metal, and having upper and lower axle extensions continuous with the spindle portion, substantially as and for the purposes set forth.

(5) A thimble skein formed of sheet metal, and having an axle extension or wrist adapted to nearly or quite embrace the axle back of the spindle, so as to give lateral as well as vertical support to the spindle, substantially as described.

(8) The thimble skein having an upper wrist extension sprung to rest on the rise of the axle back of the spindle, combined with the collar, *c*, embracing the skein at the point of increased rise, substantially as and for the purpose set forth.

"The novel form of blank" shown in this patent consists of one sheet of metal, so cut as that, when formed up into a pipe or hollow cone, it will show a complete pipe or cone, covering the end of the wooden axle, and of uniform pitch or slope back to about the point where the hurter band is to be shrunk on, or what the patentee calls the "band, *c*," from which backward the cone is enlarged for a few inches, and from thence a wing extends further back upon the under side of the axle. The enlargement back of the hurter band, however, is such that it will not cover or embrace the shoulder of the axle unless this part of the axle is brought substantially to a cone shape.

Several defenses are interposed, but I only propose to consider that of non-infringement and the novelty of the patent. It may be said to be part of the common knowledge with reference to the construction of wagons, and of skeins for wagon axles, that where a wooden axle is used, upon the end of which a pipe or hollow skein is to be fixed, the axle is much enlarged back of the point reached by the inner end of the hub of the wheel, and if a skein is intended to cover substantially more than the portion of the axle subjected to wear within the box of the wheel, a considerable enlargement of the skein must be made back of the spindle portion. For many years prior to the date of the patent in question, a skein made of cast iron was in common use, which extended back of the hurter band, and embraced the shoulder, or part of the shoulder, of the axle, and was enlarged for that purpose to conform substantially to the shape of the axle shoulder. In November, 1869, one Schreyer obtained two patents for a skein, to be formed from a blank of sheet steel or iron, a portion of which extended back from the hurter band along the under side of the

axle; but the upper part was not enlarged to embrace or cover the shoulder of the axle. A patent was granted in February, 1862, to R. S. Hall, for a sheet-metal skein, which was formed of two blanks bent so as to make an upper and lower section; the two being arranged so as to embrace the spindle of the axle, and extend back from the hurter band upon the top and under side of the axle; and in June, 1862, D. and J. Gray received a patent for a wrought-iron axle skein, which was to completely surround the spindle of the axle, and extend back beyond the hub, and to be held in place by a clip or clips, so as to re-enforce and strengthen the axle. A similar patent was granted to M. Ehr Gott in March, 1869, and a patent to J. C. Johnson in November, 1869, which shows a skein formed up so as to embrace the end of the axle, and a portion thereof to extend back from the hurter band upon the top and bottom, conforming to the shape of the shoulder of the axle. We see, therefore, that when this patentee entered the field quite a number of patents for axle skeins to be formed up from sheet metal had already been patented, and brought into public notice, and that some of them were not only clearly designed but adapted to be extended back of the hurter band, and embrace and cover some portions of the enlarged part of the axle back of the spindle, conforming, in some degree, to the shape of the axle shoulder.

The cast-iron axle skein exhibited in the proof, and shown to have been used long prior to the date of complainant's patent, shows an enlargement back of the hurter band, for the purpose of covering a portion of the shoulder of the axle; and, waiving for the time being the question of whether it is patentable to substitute wrought iron in the place of cast iron for the purposes of an axle skein, it is clear that the idea of enlarging the skein back of the hurter band so as to receive a portion of the shoulder of an axle was not new to this patentee. Indeed, the patented devices set out in the proof show several as adapted to cover a portion of the axle back of the hurter band larger than that which was intended to enter the hub. Gray shows this in a marked degree, and the proof shows that under the Johnson patent the skeins were made to substantially conform to the shape of the axle shoulder, back of the hurter band. In fact, the appliance ceases to be a skein back of the hurter band, and becomes only a support, more or less, to the axle; the skein being only that portion of the device which is intended to cover and protect the spindle of the axle. In view of the state of the art at the date of this patent, I have no doubt this patent must be limited strictly to the special device, which is the cutting of the blank in such shape as that, when formed up, it will make two frustrums of cones; the small end of the larger one springing from the large end of the smaller one, or the skein itself.

The defendants make and use a skein which is formed by bending a sheet of metal around a mandril so as to cover, more or less, the shoulder of the axle with a wing, extending backwards quite a dis-

tance upon the under side of the axle. This form of blank, when bent to the desired shape, does not make two sections of different cones, but makes a hollow spindle, the outside of which conforms to the shape of the hub box or pipe, and with an enlargement upon the top, back of the spindle, to cover and embrace the shoulder of the axle. The defendant's blank is not intended, and cannot be made, to form two cones, or sections of two cones, as does the Holmes blank, but simply forms a hollow pipe, the interior of which conforms substantially to the exterior of the axle which it is to cover. It is not a thimble skein having wings forming an upper and lower wrist extension continuous with the spindle portion, as called for by the first and third claims of the patent. It is obvious that the device of this patent is not adapted to cover or embrace an axle, the shoulder of which rises abruptly upon the top back of the hurter band, while the lower part extends back in substantially the same cone line as the spindle of the axle.

The fifth claim of the patent is for a thimble skein formed of sheet metal, having an extension or wrist adapted to nearly or quite embrace the axle back of the spindle; and the eighth claim is for a thimble skein having an upper wrist extension sprung to rest on the rise of the axle back of the spindle, etc. These claims, in view of the state of the art, I do not think can be sustained upon this patent. The fifth claim would cover any thimble skein, formed of sheet metal, having an extension back of the hurter band, which embraced, or partly embraced, the axle back of the spindle; and this field was evidently more or less occupied by all the inventors shown in the proofs to have preceded Holmes; while the eighth claim is for a thimble skein having an upper wrist extension sprung to rest on the rise of the axle back of the spindle; that is to say, the form called for by this claim is not one which can be made by following the directions of this patent, but it would be any skein, the extension of which back of the spindle should be made to cover the shoulder; while the skein called for by the patent can only be a cone back of the spindle, and cannot cover the rise of the shoulder of the axle, unless it has a corresponding rise or enlargement upon the inner side. That is to say, there is no limitation upon the size of the rear cone which may be constructed under the Holmes patent, but there must be two cones: the cone which includes the spindle, and the extension back of the spindle which is an enlarged cone, calling for as much enlargement upon the under side as upon the upper side.

I am therefore of opinion that the skein made and used by the defendant is not an infringement of that called for by the Holmes patent, because the enlargement back of the spindle in defendant's skein is only for the purpose of covering the top or shoulder of the axle, and the extension upon the under side is no more than is shown in a large number of expired patents older than Holmes'. A decree may therefore be entered, finding that the defendant does not infringe.

BROWN v. LAPHAM and another.¹

(Circuit Court, S. D. New York. April 1, 1886.)

1. PATENTS FOR INVENTIONS—LICENSE—ESTOPPEL.

A licensee under a patent is estopped to deny its validity on any question arising out of that relation between the parties. (*Kinsman v. Parkhurst*, 18 How. 289.) but it does not follow that he will be always estopped because he has stood in that relation.

2. SAME—WHEN LICENSEE MAY CHALLENGE VALIDITY OF PATENT.

When a licensee under a patent stands out from under the license, and claims nothing from it, and does nothing more under it, with full knowledge to the licensor of his position, he is at as full liberty to contest the patent as any one.

3. SAME—WHEN INFRINGEMENT BY LICENSEE WILL BE ENJOINED.

Taking and operating under a license is sufficient evidence of acquiescence to warrant an injunction without any previous adjudication, if the patent is unchallenged.

In Equity.

B. F. Clark, for plaintiff.

Samuel Greenbaum, for defendants.

WHEELER, J. The defendants appear to have been licensees of the plaintiff under his patent No. 264,854, dated September 26, 1882, for an improvement in stylographic pens, and afterwards to have repudiated the license and continued their infringement in defiance of the patent. The plaintiff has moved for a preliminary injunction. On this motion the defendants have filed affidavits tending to show that a manufacturer for the plaintiff of another style of pen, and his own workmen, devised this improvement for the plaintiff, and that they were the inventors of it, although the plaintiff got the patent for it. The plaintiff relies upon the estoppel of the defendants to deny the validity of the patent growing out of the license and the operating under it by them. There is no fair question but that a licensee under a patent is estopped to deny its validity on any question arising out of that relation between the parties. *Kinsman v. Parkhurst*, 18 How. 289. It does not follow that he will be always estopped because he has stood in that relation. When he stands out from under the license, and claims nothing from it, and does nothing more under it, with full knowledge to the licensor of his position, he would appear to be at as full liberty to contest the patent as any one. In this case, taking and operating under the license would appear to be sufficient evidence of acquiescence to warrant this injunction without any previous adjudication, if the patent was unchallenged. As it is, the plaintiff must stand upon the validity of his patent, and maintain it against this attack. On cross-examination of these witnesses, and the whole evidence when put in, this attack may not amount to any-

¹Reported by Charles C. Linthicum, Esq., of the Chicago bar.

thing decisive. As it is, upon this question as submitted, the affidavits raise sufficient doubts about the patent to stand in the way of granting this motion now. Motion denied.

COMMERCIAL MANUF'G Co., Consolidated, and another, v. FAIRBANK CANNING Co.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—IDENTITY OF PATENTED PROCESSES.

In a suit for infringement of reissued letters patent No. 10,137, of June 13, 1882, to complainants, as assignees of Hippolyte Mege, for an improved method of treating animal fats, *held*, that the invention covered by this patent was identical with that described in a Bavarian patent, which expired April 8, 1876, and in an Austrian patent, which expired May 26, 1876, both to the same inventor, and that the American patent expired with said foreign patents, prior to the beginning of this suit.

2. SAME—ESTOPPEL.

Where it was urged that patentee had estopped himself to deny that his American patent was for the same invention as patented to him in prior foreign patents, after having represented that to be a fact in his application for the former, *held*, that if the inventor was laboring under a mistake as to this point, his rights should not thereby be prejudiced.

3. SAME—TEST TO DETERMINE IDENTITY OF PATENTS.

A fair test to determine whether an American patent is identical with or included in a prior foreign patent to the same inventor is to inquire whether the use of the precise process described in the foreign patent, after the grant of the American patent, would be enjoined as an infringement of the latter.

In Equity.

Offield & Toule, (B. F. Thurston and T. D. Lincoln, of counsel,) for complainant.

Hill & Dixon, for defendants.

Heard before GRESHAM and BLODGETT, JJ.

BLODGETT, J. This suit was brought for an alleged violation of reissued patent No. 10,137, granted June 13, 1882, to complainant, assignee of Hippolyte Mege, for "an improved method of treating animal fats," the original patent having been granted December 30, 1873, and reissued May 12, 1874, and again reissued September 24, 1878, before the reissue now in question. By the specifications it is claimed that Mege invented an improved means for transforming animal fat into butter; the process described resulting in artificially producing the natural work which is performed by the cow when it reabsorbs its fat in order to transform the same into butter. His process included nine steps, the first five of which only are in controversy in this case. Briefly stated, these steps are as follows:

(1) Neutralization of the ferments or germs of decay, which is done by plunging the suet or raw fat, as soon as possible after the death of the ani-

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

mal, into water containing 15 per cent. of sea salt, and 1 per cent. of sulphite of soda, where it was to remain not less than one hour, nor more than twelve hours.

(2) The raw fat or suet is then completely crushed, by passing it between cylinders, and from them under mill-stones, which completely bruises all the cells.

(3) This crushed fat is then placed in a vessel of well tinned or enameled iron or baked clay, and this vessel is placed in a water bath. To about 100 kilogrammes of fat there are added two liters of artificial gastric juice, made by macerating, for three hours, half the stomach, well washed, of a pig or sheep, with three liters of water, and thirty grams of biphosphate of lime. The temperature of the mass of fat and gastric juice thus contained in the vessel is then slowly raised to about 103 deg. Fahrenheit, (which is the temperature of the stomach of domestic animals from which fats are obtained,) and kept at that heat until the fatty matter is completely separated from the tissue in which it is held. When this accomplished, about one kilogramme of powdered sea salt is added to each hundred kilogrammes of fat, and the mass thoroughly stirred for about one quarter of an hour, when the clear fat is drawn off. The fat thus drawn off must not have any taste of fat, but, on the contrary, must have the taste of molten butter.

(4) The molten fat thus obtained is placed in a vessel, and this vessel placed in a water bath, where it is surrounded by water which is kept at a fixed temperature of 80 deg. Fahrenheit, for the soft fats, or 98 deg. Fahrenheit for the harder fats, such as mutton fats, where the vessel remains until the stearine of this molten fat is crystallized, or deposited in the form of teats, in the middle of the liquid mass. The stearine having become hardened or crystallized, the oleomargarine remains mixed with it in a liquid or semi-liquid condition.

(5) The mass is then placed in a centrifugal machine or hydro-extractor, and the machine set in motion. The liquid oleomargarine is thrown off by the centrifugal force, while the hard stearine is retained in the cloths. A press may also be used for the purpose of separating the oil from the stearine, especially if the fat used is very soft.

The patentee says the product of these steps in the process is a greasy matter of very good taste, which may replace the butter in the kitchen, where it is employed under the name of margarine, but that it may be transformed into more perfect butter by subsequent steps, which he describes, such as making the oil into an emulsion, with a certain quantity of fresh cream and pepsin obtained from the mammary glands of a cow; but, as this part of the process is not now in question, it is needless to give it in further detail.

The claims of the patent are:

"(1) The improved material herein described, produced by treating animal fat so as to remove the tissues and other portions named, with or without the addition of substances to change the flavor, consistency, or color, as set forth. (2) The process herein described, of treating animal fats in the production of oleomargarine."

The claims of the present reissue being substantially the same as those of the original patent; that is, after two reissues, in which different claims were made from those of the original patent, the owners of the patent have by this reissue gone back to the original claims.

The defenses interposed are (1) that the patent had expired, before

the last reissue thereof, by reason of the expiration of certain foreign patents granted to Mege for the same invention; (2) that the present reissue, if it has not expired, is otherwise invalid because of the surrender of the original patent, and taking two reissues, with new and different claims, on the ground that the original was defective, and did not describe the invention, and that the patentees are now estopped from returning to the original specifications and claims as their patent; (3) that the defendants do not infringe the process described in the reissued patent.

It is conceded that Mege, who was a scientist of much merit and repute in France, some years before the application for his patent in this country, set about a series of experiments for the purpose of obtaining healthful and yet cheaper fat for the use of working people in that country, in the place of the poor butter then used by them, or to take the place of butter which they were not able to buy; and, as the result of such experiments, he discovered that the fat of beef animals and the fat of butter were substantially identical. Of the utility of Mege's discovery Prof. Henry Morton, president of the Stevens Institute of Technology of New Jersey, whose testimony is found in the record, says:

"There is, of course, a difference in the improved product described and claimed in the Mege patent, according as it is made with or without the addition of materials affecting its color, consistency, and flavor. I will therefore refer to each of these conditions separately. When the improved product of Mege, without these additions referred to, is compared with ordinary dairy butter, we find it to be substantially identical therewith, as regards its main constituents and its general consistency and character. Both products then consist substantially of mixtures, in nearly the same proportions in either case, of stearine, margarine, and oleine, and both are unctuous solids, varying in consistency, being quite solid near the melting point of ice, quite fluid at a temperature of about 90, and more or less soft and plastic at intermediate temperatures. The Mege product, however, differs from dairy butter, in the first place, as to its composition, by reason of the presence in the dairy butter of several substances not found in the Mege product. Thus the dairy butter contains about five per cent. to six per cent. of the peculiar fat known as butyrene. It also contains a smaller amount of casein; some trace of albumen; also extremely minute quantities of capriline, caproiline, and capryline. None of these substances would be present in the Mege product above referred to, which would therefore lack the peculiar flavor due to the presence of these products. The amount of water and salt would also, as a rule, be greater in dairy butter than in the Mege products. There would also be a difference in consistency, inasmuch as the dairy butter would not constitute a homogeneous mass of fatty substance, but would be a solid emulsion of such fatty substance, in which the same existed as minute spheroids or particles of the said fatty substance, separated from each other by aqueous fluid, consisting of water, holding in solution salt and traces of albumen and casein. When the Mege product has been converted into a more perfect butter, as he calls it, by the addition of certain substances as indicated by him, it will then contain all or nearly all of the materials found in dairy butter, though not exactly in the same proportions; all these distinctive matters being, as a rule, present in smaller proportions in the Mege product than in the dairy butter.

* * * As articles of food, the Mege product and ordinary dairy butter are

only distinguishable by characteristics which are variations of degree. Thus the Mege product in its simplest form would have less flavor and a less agreeable consistency than good dairy butter; while, on the other hand, its freedom from disagreeable flavor would render it superior to a low or poor grade of dairy butter. When the flavoring materials were added, the Mege product would then be extremely difficult to distinguish from the best dairy butter; but, as compared with a very fine and highly-flavored dairy butter, would be lacking in flavor. As regards wholesomeness, I do not think there would be any difference between the Mege product, in either of its conditions, and ordinary good dairy butter, though the Mege product would be the better in this respect than a strong or rancid quality of dairy butter. The same remark applies to the nutritiousness of the materials compared; while, as regards palatableness, the Mege product would, I think, hold an intermediate place between the highest and the lower grades of dairy butter, being better than the low grades, and not quite equal to the highest, in this respect."

Upon the process for utilizing his discovery, Mege obtained foreign patents as follows: In France, July 15, 1869, for 15 years; in England, on July 17, 1869; in Austria, on October 31, 1869, which expired May 26, 1876; and in Bavaria on April 8, 1873, which expired April 8, 1876. The application for the issue of the patent in the United States was made December 13, 1873.

Under the first point raised by the defense, it is now insisted that the patent granted to Mege in this country had expired in this country before this suit was commenced, pursuant to the terms of section 4887, Rev. St., because the Bavarian and Austrian patents having expired in 1876, therefore that this patent, being for the same invention, expired at the same time; while it is contended on the part of the complainant that the American patent now before us is for a process different from that described in the foreign patents, and stands as an independent patent, to run 17 years from the date of the original patent.

It is urged on the part of the defendants that Mege has estopped himself from denying the identity of the American and foreign patents—*First*, because his attorney, Mr. Seward, in his letter to the commissioner of patents of October 31, 1869, inclosing the application of Mege for the United States patent, says: "I am informed that a French patent for this process was issued to Mr. Mege, October 2, 1869." *Second*. Because Mege, on making the application for his patent in this country, made and filed in the patent-office an affidavit in which occurs the following statement:

"I am the inventor of the improvement for transforming animal fats into butter, referred to in said application; that French letters patent were duly issued to me therefor on the fifteenth day of July, 1869, and that I have caused the above application to be made for the issuance of letters patent for the United States for the said improvement."

We think there can be no doubt from the proofs in the case that both Mege and his solicitors, who are men of high standing in their professions, thought, at the time the original patent was applied for, that they were covering the substantial process which Mege had pat-

ented abroad; but if these parties were laboring under a mistake, their rights ought not to be defeated, or seriously abridged, by such mistakes, and we therefore feel compelled to examine the proof as to the identity of the foreign and American patents. We have already stated the steps in the process of the American patent, and a comparison of these with the foreign patents will, as it seems to us, best settle this question of the identity between this patent and Mege's foreign patents. Mege's Bavarian patent was granted April 8, 1873, and in his specifications he says:

"The new modes of procedure described therein consist both of chemical and physiological processes. * * * They are especially intended to benefit the navy, and the less wealthy classes, by furnishing excellent edible and preservable fats at a price considerably lower than that of present similar products; for instance, butter and the finer grades of fat. * * *

"The new procedure depends on the following conclusions of modern science: (1) That the malodorous, colored, acid, and rancid ingredients are not originally contained in the crude fats, as they occur in nature; (2) that those harmful substances are developed by activity of the organized tissues under the influence of fermentation, heat, and chemical agents; (3) that the fats of milk, termed 'butter,' consist only of the intermediate fat, which is altered by a cellular tissue, and then by the organizing tissue of the udder. By utilizing these principles in industrial pursuits or in domestic economy, there is obtained from the crude fat and the tallow (a) a pure fat, without the customary fatty smell and taste, which does not stick to the palate, and which resembles the fatty qualities most desired for eating purposes; (b) stearine for candles; (c) as a residue, common tallow; (d) this fat, really identical with the fat of butter taken from its source before it has been changed in the milk gland, can be made into different kinds of butter, which, although prepared by an artificial process, is really butter, and differs only from the ordinary butter by keeping fresh for a much longer length of time. The means employed in the preparation of these partly new, partly old, products, constitute, in their details and in their entirety, the invention, which we claim as our property. They are as follows:

"(1) Washing and crushing. The crude fat is exposed to a jet of cold water, between the conical cogs, of two iron cylinders. It is finely subdivided by the current of water and the pressure, and falls thence into a tank, where a current of cold water completes the washing. (2) Artificial digestion. This fat, now freed from all soluble animal substances, is mixed with artificial gastric juice (stomach of the pig or sheep in acidulated water) to the extent of immersing it completely, or to 1,000 kilo of fat, 300 kilo of water, 1 kilo of bicarbonate of sodium, and two stomachs (pig or sheep) are added. This mixture is then kept at the temperature of the animal body (by means of steam-pipes or otherwise) until all the molten fat has been dissolved by the pepsin, (the stomachs,) and appears in a clear layer on the surface. It is allowed to settle, or it is decanted, and the process repeated, in order to extract all the fatty constituents, which now have lost the odor of animal fat, and have obtained a particular taste. The residue is tallow. (3) Cooling. The fluid fat is poured into vessels which have an opening at the bottom, and contain a layer of tepid water. They are covered, and, when crystallization has occurred in consequence of cooling, the water is drawn off from the opening, and the vessel is inverted, and the cake is allowed to fall on a table. (4) Pressure. This operation is intended to separate the hard constituent, which makes the fat granular, congeal rapidly and stick to the palate. The cooled fat is cut into slices about one inch thick, and put into a cloth between

hot plates of a press. The portion which runs off is a mixture of margarine and oleine, resembling lard in composition, and of about the taste of fresh butter. The solid residue, taken out of the cloth, is good stearine, fit for making candles immediately."

Here we have the directions of the Bavarian patent for producing the Mege product, consisting, "first, of crushing between cogged cylinders, and washing, by which it is finely subdivided." The American patent says: "A complete crushing is necessary under millstones." So that it would seem there is only a difference in degree in the Bavarian and American processes as to the crushing. The American process says the fat must be completely crushed, so as to bruise all the cells; the Bavarian patent says it is to be finely subdivided by the current of water, and by crushing between the conical cogs of iron cylinders. In both patents, Mege uses the word "crushing" as a title or heading for his directions. The directions for the artificial digestion are the same for the two patents, except that in the Bavarian he does not instruct specifically how to make the artificial gastric juice. He simply says it is "the stomach of a pig or sheep in acidulated water;" but the proof in this case shows that the mode of making artificial gastric juice was well known in the arts before the date of Mege's invention, and he undoubtedly assumed that the person who would attempt to use the process covered by his patent would have sufficient physiological and chemical knowledge and skill to make artificial gastric juice. The American patent also states that the fat, while in the process of digestion, is to be kept at a temperature of 103 deg. Fahrenheit; while the Bavarian patent says it is to be the temperature of the animal body; but the proof in this case shows that 103 deg. Fahrenheit is the temperature of the animal body, so it would seem there is no substantial difference between the processes of digestion described in the two patents. The third step in the Bavarian patent is entitled "Cooling;" the process of which is pouring the clear liquid fat into vessels which have an opening at the bottom, and containing a layer of tepid water, where they are covered, and remain until crystallization has occurred in consequence of the cooling. He does not give specific directions as to the temperature at which the fat is to be kept during the crystallizing process, but evidently leaves that to the skill of the operator, assuming that he will sufficiently understand, by the use of the word "crystallization," what the process must be. The next step after crystallization is the separation of the oleo and margarine from the crystallized stearine; and this, in the Bavarian patent, is accomplished by pressure between the hot plates of the press. Inasmuch as the centrifugal machine or the hydro-extractor and the press are equivalent devices for accomplishing the same results, that is, of expelling the liquid or fluid contents from the mass, there is no essential difference between the Bavarian and American patents in this step of the process. The Bavarian patent is also silent as to the neutralization of the ferments

or germs of decay; but it can hardly be possible that any person would enter upon the manipulation of animal fat without sufficient common knowledge and skill to know, without instruction by the specific terms of the patent, that, in order to produce sweet and pure oil or fat, the process of fermentation and decay must be prevented. So that, taking the Bavarian patent as a whole, there would seem to be such an identity in the processes described as to make them essentially the same. Probably because Mege assumed that whoever would attempt the transformation of crude fats under his process in Bavaria would possess more knowledge or experience in regard to the handling of fats than he assumed would be known in this country, as a matter of general knowledge, he deemed it necessary in his American patent to give more minute and specific directions in regard to some of the steps of the process than he did in his foreign patents. Yet we think there can be no doubt that he has substantially described the same process in both patents.

In the Austrian patent, issued to Mege, October 31, 1869, he describes the first process under the title of "Perfect Washing," which he says is done "by crushing the fresh fat, just taken from the animal, between rollers under a spray of fresh water." The second step, "Artificial Digestion," consists in mixing the crushed fat with artificial gastric juice, (maceration of a pig's stomach in acidulated water,) in sufficient quantity to immerse it, and the mixture is kept at the temperature of the animal body until the fat appears in a clear layer on the surface. Here we have the same process as in the American patent, except that the directions for crushing do not include grinding or crushing under millstones, and he gives no receipt for making artificial gastric juice except that of the maceration of a pig's stomach in acidulated water, which we must infer he assumed was a sufficient direction to enable an ordinarily intelligent person, skilled in the art of manipulating or handling fats, to make the gastric juice. The directions for crystallization require the clear fluid fat to be poured into a vessel with an opening at the bottom, and containing a layer of tepid water. The vessel is then covered, and, when the cooling and crystallization have taken place, the cooled mass is turned out, cut in slices, and placed in canvas bags, and pressed between warm plates; by which method he says there is obtained about 60 per cent. of a fatty body, resembling butter, and identical in composition with lard, but free from odor, and of a perfectly pure taste.

The French and English patents give substantially the same description for the process as is contained in the Austrian and Bavarian patents. All the steps of the American patent, with the exception of the neutralization of the ferments, are specifically called for and described, although perhaps not with all the minute directions which are found with the American patent.

All the proofs agree that Mege was a man of inventive genius and high scientific acquirements, and it can hardly be possible that if, be-

tween the time he took out the French, English, and Austrian patents in 1869, and the Bavarian patents in April, 1873, and the time when he applied for his American patent, in December, 1873, he had discovered any substantially new and material addition to the process covered by those foreign patents, he would not have specifically named and stated wherein the American differed from the foreign patents. As already said, it seems clear from Mege's own statements, and those of his solicitors, that the purpose was to cover by the American patent what had been covered by his French patent of 1869, and we cannot believe that, if anything in addition to this foreign patent had been intended to be introduced into the American patent, it would not have been stated in some explicit terms; and there can be no doubt that the French, Austrian, and Bavarian patents are substantially identical.

The scientific experts called by the complainant, Profs. Morton, Chandler, and Wheeler, have testified that they do not think the invention described in the American patent is found in either of the foreign patents. Their reasons for such conclusion, briefly summarized are: (1) That the crushing spoken of in the foreign patents is not so complete and thorough as that called for by the American patent, where the fat is to fall from cylinders under millstones, which shall completely bruise all the cells; (2) that in the American patent the digestion is to be accomplished with a less quantity of gastric juice than is called for by the foreign patents, as the foreign patents say the crushed fat is to be *immersed* in the artificial gastric juice; (3) that by the American patent the temperature may be raised above 103 deg. Fahrenheit, "so that the matters shall completely separate," while the foreign patents limit the degree of heat to the temperature of the animal body; (4) that in the foreign patents the process of cooling is allowed to proceed to such a point that the mass can be cut in pieces or slices, while in the American patent the product is not allowed to cool so as to become rigid, but is retained at a temperature of about 86.

With all due respect to the opinions of these eminent chemists, we must say that the points of difference suggested by their testimony are purely and wholly differences in degree. The necessity of crushing is stated in all the patents, both American and foreign. The degree of crushing would obviously affect the quantity of oil extracted from the fat by the process of digestion, as the only object of crushing is to release the fat from the tissues in which it is held in its natural condition. The necessity for thorough and minute comminution is one that would suggest itself from any operative's common knowledge. Any man who had intelligence enough to know the use of his own teeth would know the necessity of the complete comminution of any article to be subjected to the process of digestion or the action of the gastric juice. It would hardly require a scientist to instruct an operative that the more finely a substance is comminuted the more

direct and prompt would be the action of the gastric juice and the process of digestion.

As to the differences in the process of digestion between the American and foreign patents, it would seem to be true that the measured quantity of gastric juice directed to be used in the American patent is less than that called for in the foreign patents, because he gives specific directions as to the number of liters of gastric juice for 100 kilogrammes of fat in the American patent, while in the foreign patent he says the fat must be immersed in the gastric juice; but the proof shows that the formula for the gastric juice in the American patent gives a more potent and effective product, and we presume Mege may, by his experience and practice under his patents, have ascertained, at the time he took the American patent, that the process of digestion could be accomplished with a less quantity of gastric juice than was described in his first patents; but this is only a difference in degree; and with a larger quantity of gastric juice and not so complete comminution, about the same result would probably be obtained as with complete and thorough crushing of all the fat cells and a smaller quantity of gastric juice, especially if made stronger or more potent; so that the difference in the American and foreign patents in that regard seems to us wholly immaterial and unsubstantial.

As to the claim that these witnesses find in the American patent permission to raise the temperature above 103 deg. Fahrenheit, we do not think it is well founded, when the whole of Mege's specifications in his American patent are considered. Under the third head, "Concentrated Digestion," Mege says: "When the fat has descended in the vessel, he melted it by means of an artificial digestion, *so that the heat does not exceed 103 deg. Fahrenheit.*" Further on, in the same paragraph, he says: "He slowly raised the temperature to about 103 deg. Fahrenheit, so that the matter shall completely separate." Taking these two expressions together, it seems to us the first limits the second, and that the directions of the patent are specific not to raise the temperature above 103 deg. Fahrenheit. Certainly the language "I slowly raise the temperature to *about* 103 deg.," does not authorize raising the temperature above that point. When the distinction immediately before us is that it must not exceed 103 deg. Fahrenheit, and when we consider this language of the specifications in the light of the testimony in the case, which shows that gastric juice is destroyed whenever its temperature is raised much above 103 deg. Fahrenheit, we think there can be no doubt that the eminent scientist who devised this process intended to keep within the limits in which his gastric juice would be operative for the purposes of digestion.

The last and final distinction, that the foreign patents contemplated a cooling of the mass below 86 deg., or until it had become stiff so that it could be handled and cut before the pressure was ap-

plied, for the purpose of separating the oleomargarine from the stearine, is a distinction, as it seems to us, without a difference. If the stearine had become crystallized in the mass, although it might at one time have been cooled below 86 deg., when it was sliced and placed between the warm plates in the press the oleomargarine would again become liquid, and flow out under the action of the warm plates and the press, so as to secure the separation; and that such was the result is sufficiently established by the statements in the foreign patents, notably the Austrian and English, that about 60 per cent. of a mixture of the margarine and oleine, of a composition identical with lard, but of superior flavor, was obtained by the pressure, would seem to show, in the light of the proof in this case, that he obtained as large a product as is obtained by the process of the American patent.

A fair test of the question as to whether the American patent is anticipated by the foreign patents, or is included in them, we think would be, were a person in this country, after the issue of the present American patent, to commence the manufacture of oleomargarine by the precise process described in the Bavarian or Austrian patents,—supposing that process had not been patented abroad,—would the courts refuse an injunction to restrain the use of the process on the ground that it infringed that covered by the American patent? We can hardly deem it possible that any intelligent court would deny an injunction, if applied for under such circumstances, and we think this fairly illustrates the relation of the foreign to the American patent.

As to the question of infringement, it is stipulated in the record in this case that the defendant, in its factory, "first runs the fresh beef fat, which has been packed with ice during the preceding night, through a hasher, where it is thoroughly hashed and is comminuted; and then melts the hashed fat in a jacketed kettle at a temperature ranging from 120 deg. to 130 deg. Fahrenheit, the fat being thoroughly agitated by mechanical stirrs while melting, and salt being mixed with the fat while it enters the kettle; and then, when settled, the melted fat is drawn off into other kettles, when the temperature is raised about 5 deg., and maintained about three hours; when the fat is put into seeders, which are kept in a room at a temperature of 84 deg. to 86 deg. Fahrenheit, until it granulates and thickens; when the stock is put into cloths holding three pounds each, in a flat cake seven by ten inches, and one inch thick. Eight of these are placed on an iron plate, and then an iron plate, in alternation, to 75 rows of cakes and plates, and put into a press. Then the oil is squeezed out by pressure in the press, and runs into a tank, from which it is pumped through pipes into a kettle in the same room and temperature, where it remains several hours, and is run into tierces.

The scientific experts for complainant say that this process is identical with that covered by the American patent; that the higher temperature at which the rendering or melting is done is the equiv-

alent of the digestion called for by the patent; and that the process of crystallization, or seeder and separation by pressure, are substantially the same.

We do not think it necessary to decide whether the process used by the defendant, and that covered by the patent, are identical, or substantially so, because our view of the first question raised by the defendant must be decisive of the case; but it would seem to the uninitiated certainly that there is room for a wide difference between the physiological process which Mege describes and directed should be pursued, and the mere rendering process at a low temperature which the defendant followed. A reading of Mege's several patents, with his introductory remarks in regard to the nature and character of his invention, impresses us with the conviction that he thought his was a physiological process, and dependent on physiological principles; that this process of digestion, by means of artificial gastric juice, at the temperature of the animal body, was an essential step in the production of the article which he designed should take the place of butter; while all the witnesses in this case agree that the product of the defendant's process, while it is pure fat, is odorless and tasteless, which is not the product which Mege intended should result from the practice of his process, as he says the product of his process should have the taste of almonds or of fresh butter. Without, therefore, further discussing the question of infringement, we simply say that we find that the complainant's patent expired April, 1876, by the expiration of the Bavarian and Austrian patents. The bill is therefore dismissed for want of equity.

HANCOCK INSPIRATOR CO. v. LALLY.¹

(*Circuit Court, N. D. Illinois.* March 22, 1886.)

1. PATENTS FOR INVENTIONS—NOVELTY—INSPIRATORS.

The third claim of letters patent No. 185,861, granted January 2, 1877, to John T. Hancock, for an improvement in inspirators, is void for want of patentable novelty over the Giffard English and French patents of 1858, for injectors, and the English patent of Barclay and Morton of November, 1863.

2. SAME.

"Lifters" and "forcers" arranged in an axial line with reference to each other, for injecting water into a steam-boiler, being old at the date of the Hancock patent, and no special advantage being shown to have accrued by the arrangement of the two devices side by side, as provided in the patent, *held*, there was no invention in such arrangement.

3. SAME—CERTAINTY OF DESCRIPTION.

In order to save this patent from being void for lack of certainty in description of the devices covered by this third claim, it is necessary to assume that

¹Reported by Charles C. Linthicum, Esq., of the Chicago bar.

their construction was a matter of common knowledge in the art when it was applied for, and in this view the mere arrangement of these devices in a new relation to each other did not involve invention.

In Equity.

Elmer P. Howe and Chauncey Smith, for complainant.

Rodney Mason and B. F. Thurston, for defendant.

BLODGETT, J. This bill is brought to restrain the alleged infringement of letters patent No. 185,861, granted January 2, 1877, to John T. Hancock, for "an improvement in inspirators." This patent belongs to that class of devices of comparatively recent origin which are arranged to force a jet of feed-water into a boiler by the direct action of the steam of the boiler. The patentee says in his specifications:

"The object of my invention is—*First*, to supply water to a boiler by a less expenditure of power than that required for a pump, and consequently with a relative saving of fuel; *secondly*, to draw the required quantity of water, by means of the attractive power of steam acting in one part of my apparatus, from the greatest depth which a pump is capable of doing, and to deliver the same to another part of my apparatus in quantity equal to what the said part requires at all varying pressure of steam, from zero upwards, and with reasonable variations in the temperature of the water; *thirdly*, to regulate the supply of water to the requirements of a boiler, even when the apparatus is exposed to sudden jars or shocks, thus insuring a constant and reliable feed. * * * My invention consists in the employment and combination of two sets of apparatus, contained each in a separate chamber, the one being employed for lifting water from a well or other source of supply, and conveying the same to the other chamber, from whence it is conducted to the boiler."

The patent contains five claims, but the allegation of infringement in this case only applies to the third claim, which is as follows: "The combination of an injector for forcing water into a boiler, and a second injector communicating with the well, and communicating with and supplying water to the first, substantially as described."

In 1858, Henry Jaques Giffard obtained patents in France and England for a device for forcing water into a steam-boiler, the first form of which is substantially like either of the devices which Hancock has coupled together to make what he calls his "inspirator." The instrument went into general use, and was patented in this country, and a large number of patented improvements upon the original device of Giffard are shown by the proof to have been taken prior to the date of the invention claimed in this patent. The operation of the original Giffard invention depended upon a few simple mechanical principles. It is well known that if a pipe be extended into a well or reservoir containing water, and steam be let into this pipe so as to expel the air, or remove the atmospheric pressure for the time being, the water will rise in the pipe to the same height that it would in the ordinary suction pump. The steam has no attractive power to draw the water, but the water is raised solely by atmospheric pressure. Organized simply upon this principle, the Giffard device is what may be called merely a lifter; that is, it takes the atmos-

pheric pressure off the pipe leading into the reservoir, and allows the water to be forced, by the weight of the atmosphere, into the pipes of the injector or lifter to the extent to which the atmospheric pressure will accomplish this purpose. It had been, long before this patentee entered the field, demonstrated and become a part of the common mechanical knowledge of those versed in the art that, to make a lifter of this instrument, the area of the combining tube at its smallest diameter must be greater than the area of the steam-jet which is to expel the air from the combining tube to cause a flow of water into the same; while, in order to impart to the stream an increased momentum or velocity, so as to make the instrument a forcer, the area of the steam-jet must exceed the area of the combining tube at its smallest diameter. In other words, if the combining tube of the lifter is made smaller than the area of the steam-jet, the steam cannot escape through the combining tube, but will recoil, and hinder, if it does not wholly prevent, the flow of water into and through the combining tube; while the current through the latter being established by the lifter, the volume of steam from the forcing jet must then be made large enough to impart its velocity to the current of water in the combining tube, so as to send the water with increased momentum into the boiler. Another characteristic of all these devices, known before the invention of this patentee, was the fact that, in order to make the instrument operative, there must be an opening somewhere beyond the end of the combining tube, through which the air to be expelled therefrom, and the steam and water first admitted, could pass, in order, as it was commonly expressed, to prime the instrument, and get sufficient head or velocity upon it to enable it to act against and overcome the pressure of the boiler, and drive the water into it.

In the English patent Giffard showed by the second drawing a device by which the jet or stream of water, which had been sent into and through the combining tube by the action of the lifter, received another jet of steam, giving it the increased impetus necessary to drive the water into the boiler; these tubes of Giffard being arranged in an axial line to each other,—that is, the second tube, upon which the forcing jet of steam is applied, is directly in the line of the combining tube, which receives the jet of steam, and causes the water to be lifted. In the first form of the Giffard injector the instrument is so constructed that the jet of steam first applied is smaller than the area of the combining tube, and hence, in its first operation, the instrument is a lifter; but after the air has been expelled, and the instrument become primed, and a flow of water established through the combining tube by the operation of the instrument as a lifter, the area of the steam-jet is enlarged so that from that time forward the instrument operates as a forcer; that is, the original simple Giffard injector in its first form, as shown in his French and English patents, was a combined lifter and injector. He says:

"This apparatus, which may be considerably modified without changing the principle of its action, consists, according to one arrangement, as applied to a steam-boiler, of a steam-jet or injection pipe, which receives steam from the boiler, and directs it in a continuous jet into a small passage, the lower end or mouth of which is expanded sufficiently to admit of the entrance of a stream of water which, by surrounding the steam-jet pipe, forms an annular jet of water, with the steam-jet in the center; * * * or two steam and water jets may be used in such cases, such as where the condensation of the steam is not sufficiently rapid, owing to the heated state of the water in the hot well or tank of the engine. * * * In case the initial temperature of the water in the well or reservoir (or tender, when applied to locomotive engines) should be too high, which cannot always be avoided, to condense the entire quantity of steam issuing from the nozzle it would be requisite to divide the actuating steam-jet into two parts, as shown in Fig. 2; the first portion acting as above described, drawing up the water, and imparting to it only a fraction of the necessary speed; and the second portion, arriving by the pipe, *t*, and having its annular sectional form regulated by the screw, *w*, would impart to the vein or jet a fresh impulse in the diverging mouth-piece, to any point where the ejected water would still possess a portion of the pressure of the boiler. Now, with this portion of the pressure above the pressure of the atmosphere, the water could condense the fresh amount of steam, which would then no longer act except with the difference of the total pressure already acquired, and would thus be introduced into the boiler under the most favorable conditions. This principle may be modified and worked out in various ways."

It will thus be seen that Giffard, in his original patent, suggested and showed the application of a second jet of steam, to act as a forcer upon the column of water which had been raised by the action of the lifting portion of the device.

In the English patent of Barclay and Morton, issued in November, 1863, an injector or "lifter" is shown, of which they say:

"It may be necessary to combine two of the before-mentioned apparatuses, so that the one may merely raise or lift the water or the other fluids, while the other then merely forces it; and also one lifting apparatus may be combined with that known as 'Giffard's Injector,' and by this means supply water to steam-boilers from any depth where an ordinary lift-pump is required."

Without traveling through the large volume of testimony in the record in this case, it is enough to say the proof shows that when Hancock entered the field lifters were old, and forcers were old; that is, Giffard showed a forcer working in connection with his lifter, and also that his simple lifters were transformed, when they had once got into operation as lifters, into forcers. It seems to me that all that Hancock did was to take the forcer, which Giffard had arranged in a direct line with the tubes of his (Giffard's) lifter, and arrange or set this forcer along-side of the lifter, instead of allowing it to extend beyond, in the same line with the lifting pipe; and, when thus arranged, the forcer of Hancock performed the same function that was performed by the injector of Giffard after the lifter had set the column of water flowing into and through the tubes, when, the steam-jet being increased, the instrument became from that time a forcer. No new function is performed by either instrument in the change of position,

but the two continue to do, in the Hancock combination, just what they had done in the Giffard combination, and just what Barclay and Morton suggested they might be made to do in their device.

It is also noticeable that while the proof shows that the law of the operation of this device as a lifter and a forcer was well known at the time Hancock entered the field, yet nowhere in the specifications of his patent does he give any directions for constructing one-half as a lifter, and the other as a forcer. He does not state the proportions of the two pipes, and how one shall be constructed in order to operate as a lifter, and how the other shall be constructed to operate as a forcer. It may be true, and it probably is, that the art of constructing this class of instruments was so well known at this time that it was sufficient to say to a person skilled in their construction that one side should be constructed to force, and the other only to lift, and the skill and experience of the workmen would supply what was left out of the specifications as to the proportions of the two instruments. This view, and this alone, saves the patent, so far as this third claim is concerned, from being absolutely void for uncertainty, because he does not instruct the public how to make lifters, nor how to make forcers; and if the rules for constructing these different instruments were not then well known, then the instruments cannot be made and combined. In other words, he seems to have assumed that the difference between a lifter and forcer was part of the common knowledge of those skilled in the art of making injectors.

Much of the contention between the experts in the case centers around the question whether an instrument constructed according to the second form shown in the French and English patents will work as a practical combined lifter and forcer, and feed or supply a boiler with water under varied pressure. Witnesses in behalf of complainant testify to experiments made by them with such an instrument with which they wholly failed to do the work; while witnesses for defendant testify to the successful use of injectors made in strict conformity with the drawings of these foreign patents. Of course, if the Giffard device, or a machine made according to his drawing, will not work, or was not a practical and useful machine, operating substantially upon the principle shown in the Hancock, then the Giffard device should not be deemed an anticipation of Hancock's; but I am satisfied from a careful study of the proof that an injector made after the plans of Giffard's Fig. 2 is and will be a practical working injector, lifting the water, and forcing it as successfully as an instrument constructed under the direction of the Hancock patent, and hence I conclude that the Giffard patents show a practical and successful mode of combining a lifter and forcer which produces the same result as the Hancock, and differs from it only in the juxtaposition or location of the operative parts.

The defendant sells an injector manufactured by James Jenks, of Detroit, in which he also has arranged the forcer and the lifter side

by side, instead of placing them in an axial line to each other. Forcers being old and lifters being old in the art, and the Giffard patents, and several of the other earlier patented improvements upon Giffard's device, having expired, any person had the right to take the injector and the lifter, as shown in Giffard's device, and arrange them, either as he arranged them, the one following the other, or side by side, the way Hancock has arranged them. No such special advantage is shown to have accrued by the arrangement of the two devices side by side as to make that arrangement of itself patentable. The instruments still operate by the same law, and in the same manner, when the two are along-side of each other as they did when the forcer was ahead of and in the line of the lifter. I therefore conclude that, so far as the Hancock patent is concerned, he had no right, at the time he took his patent, to cover broadly the combination, which he does by the third claim of his patent, of an injector for forcing water into a boiler and a second injector communicating with the well, and communicating with and supplying water to the first, because Giffard and Barclay and Morton had instructed the public how to do this long before the date of his invention, by the use of substantially the same operative parts.

The bill is therefore dismissed for want of equity.

BLADES v. RAND, McNALLY & Co.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—TICKET CASES.

Letters patent No. 86,277, of January 26, 1869, to Frank Brewster, and No. 145,388, of December 9, 1873, to Leonard J. Blades, construed, and *held* limited to the special devices which they describe and claim, and not infringed.

2. SAME—PATENTS CANNOT SUPPLEMENT EACH OTHER.

These two patents cannot support or supplement each other. They are each for combinations, and the question is whether the defendants use the combination shown in each, and not whether parts in each combination can be found in each patent.

3. SAME—ACQUIESCENCE IN REJECTION OF APPLICATION—EFFECT OF.

Where a patentee, having made broad claims in his application, which were rejected, accepted claims for a combination of the parts shown, he must be limited to his specific device.

4. SAME—ASSIGNEE BOUND BY APPLICANT'S ACTIONS.

The action of an applicant for a patent in accepting restricted claims is part of the law of the patent, and controls the assignee as well as the original patentee.

5. SAME—REFERENCE TO REJECTED APPLICATION.

Although the broad claims of this application were rejected on a reference to a rejected application, in accordance with the then practice of the patent office, which practice was soon afterwards overruled by the supreme court, *held*, that the applicant having acquiesced and taken a limited claim must now be confined to the claim he accepted.

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

In Equity.*Offield & Towle*, for complainant.*Gridley & Fletcher*, for defendants.

BLODGETT, J. This suit is brought to restrain the alleged infringement of patent No. 86,277, granted January 26, 1869, to Frank Brewster, for "an improvement in railroad ticket cases," and patent No. 145,388, granted December 9, 1873, to Leonard J. Blades, for "an improvement in ticket cases," and for an accounting.

The Brewster patent is for a case containing any desired number of ticket drawers, or pigeon-holes, for holding the tickets for the requisite number of stations; these drawers being so constructed that each is complete in itself, and easily taken from or replaced in the case. The rear ends of these drawers are raised so as to incline the drawer towards the front of the case, and the tickets are placed in the drawer, either upon the end or edge, so as to present the face of the ticket to the front of the case. In the front end of the side pieces of these drawers are narrow strips of metal, or other suitable material, against which the ends or edges of the tickets rest, so as to keep them in place, and at the same time allow the face of the front ticket to be plainly seen from the front of the case. The upper ends of these strips are also bent over on the upper edge of the drawer, and a small slot cut in the angle only wide enough to allow the withdrawal of a single ticket at one time; and this withdrawal must be by pushing the ticket upwards instead of downwards. Behind the tickets is a follower, arranged with a rod and spring, so as to keep the tickets in the drawer pressed firmly against the front strips. The object in setting these drawers at an incline is stated to be to give room for the drawing of the tickets over the tops of the drawers. The patentee disclaims the older devices "for the prevention of the withdrawal of more than one ticket at once, where the tickets present an end-edge front, and are withdrawn from the bottom." The patent contains but one claim, which is: "The combination of the drawer, *c*, having upon its front edges the metallic strips, *f*, slotted as described; the rod, *i*, having attached thereto a follower for pressing forward the tickets, and the springs, *j*, *j*, all constructed and arranged and operating substantially as set forth."

As to the Blades patent, it is stated in the specifications that the invention is for an improvement in the class of railway ticket holders in which the slides or drawers are provided with spring-guided followers for pressing the tickets forward into position to be seized and drawn out. He says:

"I employ a follower actuated by gravity, thereby economizing space, and securing other advantages, and so construct and arrange the slides and their containing case that the tickets may be drawn downwards, and then out of the slide compartments, and the slides themselves also drawn forward and suspended in a vertical position for refilling with tickets, as will be hereafter more fully described."

The description of his device shows an outer case, constructed with upright sides, upon the inside of which uprights he cuts grooves inclining upward from the front towards the rear. He then forms the drawers or slides, the bottoms of which extend laterally, forming flanges which fit into these grooves. There may be any number of these drawers, and each drawer is divided by vertical partitions into as many compartments as may be wanted. The tickets are to be placed on edge or end in the drawers, so as to present a front face, and small stops of wood or metal are fixed to the partitions to prevent the tickets from sliding out of the front ends of the slides or drawers; but each compartment is left sufficiently open to show the face of the ticket, and a slot is left between these stops and the bottom of the drawer large enough for a single ticket to be withdrawn at a time, and the tickets are drawn downwards instead of upwards, as in the Brewster case. The pitch or inclination of the drawers is such as to incline the bundle of tickets by its own gravity down against the front ends of the drawer, and a metal follower is placed behind the tickets, which, by its weight, keeps the tickets upright, and presses them firmly against the front strip of the drawers. The drawers are kept in the groove by resting against a stud driven in the front part of the groove, and a lug or hook is placed at the rear end of the drawers; and, for the purpose of replacing the tickets, the forward ends of the drawers are lifted over the stud, and the drawers slid downwards until the lug at the rear end catches on the studs in the front end of the groove, when the drawer will be suspended nearly vertically, and in a convenient position for refilling them with tickets. The claims of this patent are—

"(1) A series of ticket-holding slides, *c*, arranged in inclined ways in a case, *a*, and having strips, *e*, applied vertically, or nearly so, to the front edge of the partitions, *d*, so as to leave a space, *g*, at the bottom, and the gravitating follower blocks, *f*, all combined as shown and described. (2) The combination of the ticket-holding slide, *c*, having lugs or projections, *h*, at the rear side, with the case *a*, having grooves, *a*, and studs, *i*, combined as shown and described, whereby the slides may be drawn forward and suspended vertically, to be filled as specified."

The defendants make and sell a case in which ticket-holding drawers are set into a case inclined so that the rear end is much higher than the front, and so arranged as to show the face of the tickets, and with a follower, actuated by its own gravity, behind the tickets, for the purpose of keeping the tickets upright, and pressing them to the front; the front having narrow vertical strips which prevent the tickets from falling, or passing out through the front end of the drawers, and with a slot formed by these front strips and the bottom for withdrawing a single ticket at one time by a downward motion.

The defenses are (1) that the patents are void for want of patentable novelty; (2) if not void for want of novelty, they are limited by the state of the art to the special devices shown, and, when so limited, defendants do not infringe.

Before discussing these questions raised by the defense, I will say that I do not see how these patents can support or supplement each other. They are each for combinations, and the question is whether the defendants use the combination shown in each, and not whether parts of each combination can be found in each patent. The proof also shows that the Brewster case, as described in his patent, has never gone into public use. The large space required for its separate drawers, the provisions for the withdrawal of the tickets by an upward instead of a downward movement, and the defects in the practical working of the follower and spring for pressing the tickets to the front, form, when all taken together, such objections to its use as have prevented its acceptance and adoption as a practical ticket case.

The evidence shows that in May, 1854, the executors of Thomas Edmondson obtained a patent for a railway ticket case in which the tickets were placed in nearly vertical tubes, the rear ends of which were raised so as to incline the tickets, as they lay flat in the tube, somewhat towards the front of the case; and while these pigeon-holes, or "tubes," as they are called in the patent, have an opening in the front, I do not think it can be fairly said that it was a part of the design of the structure to show the face of the ticket through this opening, and the tickets were withdrawn from the bottoms of the tubes by pulling them forward. The proof shows that this case went into extensive use in this country, and has so nearly filled the public want that, although the Blades case and the defendants' case are deemed substantial improvements, especially where business calls for a rapid sale of tickets, it still holds its place as a useful device.

Following the Edmondson patent, came, in February, 1856, the Apperly patent, and in May, 1856, the Conkling patent, and in January, 1862, the Duffield patent; all of which showed drawers or tubes for holding the tickets flatwise, and withdrawing them singly from the bottom. Each of these also showed a device by means of a weight or spring to press the tickets firmly against the bottom, so as to insure their ready withdrawal; and the Duffield patent shows the drawers inclined towards the front, but no device for showing the face of the ticket and withdrawing it from the front instead of the bottom is shown in the proofs until the Brewster patent.

The proof shows that in the application for his patent Brewster claimed "(1) a ticket case having movable apartments or drawers, *c*, with springs, *j*," etc. "(2) I claim a ticket case which presents the ticket front face, in combination with a spring or device for forcing said tickets forward, as shown," etc. "(3) I claim the inclined apartments, as shown. (4) I claim the slot, *g*, in the upper part of and at the angle of the strip, *f*, through which to draw the tickets upwards," etc.

The application with these claims was rejected, and Brewster then amended his application, and accepted the single claim which ap-

pears in the patent. This claim is for the construction of the drawer, *c*, having upon its front edges the metallic strips, *f*, slotted as described, the rod, *i*, having attached thereto a follower for pressing forward the tickets, and the springs, *j, j*; all constructed, arranged, and operating, etc. It seems to me that this patentee having, in the first instance, made broad claims, which were rejected, and then accepted a mere claim for a combination of parts shown, must be limited to the specific device. The proof shows that his first application was rejected on a reference to a rejected application shown in the files of the patent-office, which practice of the office was soon afterwards overruled by the supreme court; but this applicant acquiesced, and took a limited claim, and must now be confined to the claim he accepted. This combination includes the rod, *i*, having attached thereto a follower, and the springs, *j, j*, and this seems to me to limit him to a spring follower, and he cannot cover in this claim a follower operating by its own gravity, although he says "other styles of springs" may be used, and "the same results may be accomplished with a weight and roller," because he had claimed in his first application, broadly, "a spring or device for forcing said tickets forward, as and for the purpose specified," and then abandoned that broad claim, and taken one which confines him to the specific arrangement shown; and having also made broad claims for showing the front face of the tickets, and for the inclined apartments, and those claims having been denied, he has, by accepting the restricted claim, abandoned the extension of his claim by construction so as to cover what was in terms refused him, and his action in this matter is part of the law of the patent, and controls the assignee as well as the original patentee.

As was said by the supreme court, speaking by Mr. Justice BRADLEY, in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274:

"Here, again, the patentees clearly confine themselves to wide and thin bars. They claim the use in truss bridges of such bars when the ends are upset and widened in the manner described. It is plain, therefore, that the defendant company, which does not make said bars at all, but round or cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot enlarge or alter it. * * * When the terms of a claim in a patent are clear and distinct, (as they always should be,) the patentee in a suit brought upon the patent is bound by it. * * * As patents are procured *ex parte*, the public is not bound by them, but the patentees are; and the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

If the defendants' inclined tubes and drawers are the equivalents of the drawer, *c*, of the Brewster patent, they are not used in combination with a follower rod and spring, such as Brewster limits himself to; nor are they used in connection with metallic strips, *f*, slotted as described in Brewster's patent. Without further discussion, then, I feel compelled to find that the defendants do not infringe the Brew-

ster patent. While defendants' case is organized like Brewster's, so as to show the front face of the ticket, and with a device for pressing the ticket forward, still the limitations of Brewster's patent require the use of the entire combination which he covers by his claims, and, as the defendants do not use the entire combination, I feel compelled, under the proofs, and the law applicable thereto, to find that defendants do not infringe the Brewster patent.

The proof shows that Blades, in the application for his patent, claimed "(1) a ticket holder, *c*, having an inclined bottom and front strip, *e*, combined with the forwardly inclined loose sliding block, *f*, as and for the purpose described; (2) one or more ticket holding and distributing drawers, sliding obliquely in the case, *a*, as and for the purpose set forth." The patent with these claims was rejected, the examiner reporting, "All the patentable features in this case are shown in the patent of Frank Brewster." The application was thereupon amended by erasing the second claim; and an argument was filed, insisting that the inclined block, pressing by its gravity upon the tickets so as to hold them together, is not the equivalent of the follower rod and spring used for the same purpose by Brewster; and that, as Brewster's patent was for his specific means, Blades was entitled to a patent for his means for pressing the ticket in front. Thereupon the examiner reported as follows: "A follower in a ticket case, connected by a spring, is considered an equivalent to a follower connected by gravity, and no patentable difference is perceived;" and thereupon Blades amended his application by erasing the first claims applied for and taking the two claims now shown in the patent.

The second claim of this Blades patent is for a combination of the ticket-holding slides, *c*, having lugs or projections, *k*, at the rear side, with the case, *a*, having the groove, *a*, and studs, *i*, combined as shown and described, whereby the slides may be drawn forward and suspended vertically, to be filled as specified. As the defendant's ticket case shows no lugs like the lugs, *k*, upon the Blades drawer at the rear, and no grooves in the sides of the case, and no studs, and no arrangement of parts whereby the slides may be drawn forward and suspended vertically, I am very clear that this claim is not infringed by the defendants' case. It will be noticed that in his first application Blades claimed a ticket holder having an inclined bottom and front strips combined with his gravity follower or pressure. His patent with this claim was rejected, and he finally took as the first claim of his patent "a series of ticket-holding slides, *c*, arranged in inclined ways in the case, *a*, and having strips, *c*, applied vertically, or nearly so, to the front edge of the partition, and the gravity follower."

In view of what was done in the patent-office, I have no doubt but Blades must be limited to his ticket-holding slides, moving in the groove, *a*, upon the flanges, *c*, and held in place by the stud, *i*. In other words, the patent-office allowed him a patent upon just what

his claim described, and no more, and he accepted his patent upon those terms. It is clear from Blades' specifications that he considered the "lug, *k*, and the stud, *i*, each operating in connection with the groove, *a*, permitting the suspension of the drawers in a vertical position to be refilled with tickets," as an important feature of his device, for he not only covers it specifically by the second claim of his patent, but he says in his specifications that he so constructs and arranges the slides, and their containing case, that the slides themselves may be drawn forward and suspended in a vertical position for refilling with tickets, and by the terms of the first claim the slides must move in the groove, *a*. Taking, then, his action in connection with the patent-office, and the obvious double purpose of his grooves and flanges as indicated by the two claims which he took, there can be no doubt that he must be confined to a case with grooves in which the drawers provided with flanges slide, and with such an arrangement of parts as that the drawers may be suspended vertically upon the front of the case.

The defendants' device, as already described, consists of a series of tubes arranged and inclined side by side in tiers, with a gravity follower, and each tube or slide may be removed by itself. There is no groove, *a*, and there are no flanges to the drawers or tubes. There are no studs to hold the drawers in place, and no lugs at the rear of the drawers by which they can be vertically suspended. In fact, the defendants' tubes are suspended, rather than slid, into the defendants' case, being held in the rear by a hook, and their forward ends resting upon a cross-piece, so as to hold them at an acute angle in the case. The difference between the cases is not wide, but it must be remembered that this field had been quite fully passed over and occupied by other inventors before Blades entered it. In fact, there seems to me to have been very little room for the exercise of inventive talent after the production of the Edmondson case in the modification of an Edmondson case into a Blades case, although considerable time elapsed before the Blades case was brought out. The Edmondson tubes or drawers were fixed and stationary in the case. The bottoms of his tubes were inclined towards the front, and the tickets were to be withdrawn from the bottom through a slot. About all that Brewster or Blades did was to modify the Edmondson case by setting the tubes at a more acute angle, so that the face of the tickets could be read from the front of the case, and apply force, either by a spring or weight, to press the tickets to the front, and make a slight change in the slot, through which the tickets should be withdrawn by a downward movement. The Brewster case seems to have been an ordinary case, with pigeon-holes so arranged that each of the drawers which he describes can be passed into one of the pigeon-holes, and there held in an inclined position. The fronts of the drawers, from the fact that they were so held, formed a series of steps upon the front of the case; so that when Blades came in with

his device for a patent, the patent-office told him that all he had done had been anticipated by Brewster; that is, Brewster had shown an inclined slide, holding a front-face ticket in a slot, by which the ticket could be withdrawn, and a spring to press the ticket to the front; and he was also told that there was no patentable difference between using the weight and a spring for the purpose of pressing the ticket to the front. Apperly, Conkling, and Duffield had already shown weights or springs for the purpose of pressing the tickets to the front, from which they would be delivered, and this was the object, and the sole object, of the spring in Brewster's and the weight in Blades'. It therefore seems to me no hardship to hold Blades, and those operating under his patent, to the specific devices covered by it, which was all the patent-office evidently intended to allow him; and, confining him to his device, the defendants evidently do not infringe. The bill is therefore dismissed for want of equity.

POPE MANUF'G CO. v. OWSLEY. (Bill.)¹

OWSLEY v. POPE MANUF'G CO. (Cross-bill.)

(Circuit Court, N. D. Illinois. 1886.)

1. PATENTS FOR INVENTIONS—EQUITY JURISDICTION—LICENSE—DISCOVERY.

Equity has jurisdiction to compel a discovery of the number of patented articles made under a license, where the licensee neglects or refuses to make monthly reports as he has covenanted to do; and a covenant to make monthly reports is, in fact, a covenant for a monthly discovery of the work done under the license.

2. SAME—RESTRICTED LICENSE—INFRINGEMENT.

Where a license does not purport to give an unlimited right to the use of the patent, but restricts the right to machines of certain descriptions, when licensee makes machines not in conformity to his license, but within the patent, he not only violates his express covenant not to do so, but violates the patents.

3. SAME—REVOCATION OF LICENSE.

A license provided that licensor might terminate it by notice in writing. He sent a postal card to licensees, reading: "Your royalty return for February has not come to hand. Failure to forward same within five days from March 10th subjects your license to revokement." *Held*, that this paper fell far short of a notice in writing of a revocation or termination of the license.

4. SAME—WHEN LICENSEE ESTOPPED TO DISPUTE VALIDITY OF PATENT.

Licensees under patents covenanted that they would not dispute or contest the validity of the same, or of complainant's title thereto. *Held*, that as long as the licenses remain in force defendants are estopped by the terms of their agreements, from denying the validity of the patents in question.

5. SAME—THREATS OF SUIT—EFFECT ON LICENSE TAKEN IN CONSEQUENCE.

The mere fact that the owner of a patent alleges an infringement, and threatens suit unless a settlement is made with him, cannot be held to make such settlement void for fraud or intimidation.

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

6 SAME.

The fact that defendants feared the result upon their business of a suit for infringement of patents, and therefore settled and took a license, is no support to a charge of fraud in the procurement of the license.

7 SAME—LICENSE UNDER EXPIRED PATENT.

Where a license was granted covering a large number of patents, including one which had already expired, but which licensor owned and licensee had infringed, and there was no proof that it was included by the licensor in bad faith, *held*, not enough to taint the transaction as fraudulent.

8 SAME.

The date or duration of a patent is a matter of public record of which a licensee is as much bound to take notice as the licensor.

9. SAME—EFFECT OF DECISION ADVERSE TO PATENT.

A license under patents is not affected by the fact that in a suit between other parties the patents have been adjudged void, where the licensee has agreed not to contest their validity.

10. SAME—ESTOPPEL.

Where licensee under a patent agrees not to contest its validity, nor licensor's title, he cannot urge want of patentability, nor any question save that whether his devices are covered by it.

11. SAME.

Where the alternative to settle a claim for infringement or litigate is fairly tendered to a party, and he chooses to settle, he cannot afterwards retreat from the settlement merely because some other party has successfully contested the validity of the patents.

12. SAME—CONSTRUCTION OF INSTRUMENT.

Where a license included a large number of patents, and provided that licensees should pay a stipulated royalty on all machines made by them "embodying in their construction or mode of operation the inventions and improvements shown and described in each, all, or either of said letters patent," *held*, that so long as licensees used either of the patents they were liable to pay the royalty named in the license.

In Equity.

Coburn & Thacher, for complainant.

West & Bond, for defendants.

BLODGETT, J. The original bill in this case alleged that on the sixth day of October, 1879, complainant entered into an agreement in writing with the defendants, then doing business under the firm name of the St. Nicholas Toy Company, which agreement is annexed to the bill, and made a part thereof, as Exhibit B; in which agreement it is recited that complainant "owns and controls certain letters patent of the United States for the inventions therein set forth and described, enumerating eleven patents, and that defendants "are desirous of securing license and authority to work under said patents, and make and sell the inventions therein described." Wherefore it is agreed:

"(1) The complainant licenses defendants, subject to conditions in said agreement contained, to make, use, and sell, to the full end of the term for which each of said letters patent were granted, wooden bicycles whose wheels do not exceed fifty inches, made principally of wood, embodying in their construction or mode of operation the inventions or improvements shown or described in each, all, or either of said letters patent.

"(2) The defendants agree to make full and true returns in writing to complainant, on or before the tenth day of each calendar month in each year, of all bicycles containing said improvements so manufactured by them dur.

ing the month preceding, and the name or names of any or all purchasers of the same, and to pay the royalty or license fee accruing thereon, on or before the said tenth of each of said months; and to keep full, true, and correct books of account, open at all reasonable times to the inspection of the complainant, in which shall be entered and set down all velocipedes made and sold by them; and to mark each machine sold 'Patented;' and to pay complainant as license fee or royalty upon each and every bicycle whose wheels do not exceed 42 inches in diameter, \$1, and upon each one whose wheels exceed 42 inches, and do not exceed 50 inches, \$2, so manufactured and sold by the defendant, containing the improvements set forth and described in said letters patent, or either of them."

Defendants also agreed that they would not make or sell any bicycles other than those having wooden wheels, and not of greater diameter than 50 inches; "nor in any manner, directly or indirectly, violate or infringe upon said letters patent, or either of them; nor dispute or contest the validity of the same, or of complainant's title thereto," and in case the defendants should violate any of the provisions contained in the said agreement on their part, the plaintiff might terminate said license by notifying the defendants in writing that their said license had been revoked. The bill then avers similar agreements or licenses made between the same parties, one bearing date July 16, 1881, two dated November 1, 1881, and one dated February 3, 1882, and enumerating different patents as owned by the complainant, and licensing the defendants to make bicycles and velocipedes of different sizes and construction, and baby carriages, with wire wheels and rubber tires; all of which licenses contain substantially the same provisions as to payment of royalties or license fees called for by each of them, the making of monthly reports, the keeping of books, the agreement of defendants not to contest or dispute the validity of the letters patent enumerated in the licenses, and the provision for the termination of licenses by the complainant in case of default by defendants, such as are contained in Exhibit B; copies of all these licenses being attached as exhibits to the bill, and made a part thereof; Exhibit B enumerating 11 patents; Exhibit C, 14 patents; Exhibit D, 13 patents; Exhibit E, 11 patents; and Exhibit G, 12 patents,—as owned and controlled by complainant, describing such patents by their official numbers, dates, and the names of the persons to whom they were respectively granted, and describing some of them as reissues. The bill then charges that defendants, acting under the said licenses, made monthly reports and paid royalties as called for by the respective instruments, up to the first of March, 1883, when they refused to pay any more royalties, refused to make any more reports, and although there is no specific or direct allegation that defendants still continued to manufacture articles on which they should report and pay royalties as provided by said licenses or agreements, yet it is indirectly so stated. It is also stated in the bill that the defendants are making and selling velocipedes and bicycles of different sizes and construction than were allowed by their license,

in violation of their covenants contained in said license or agreement that they will not make any other bicycles or velocipedes or wheels than such as are described and authorized by the licenses. The prayer of the bill is for a discovery of the number of bicycles and wheels for baby carriages made by defendants in accordance with and under the provisions of the several licenses mentioned since they have failed to make their monthly reports, as called for by said agreements; that they be decreed to make reports in writing, and to pay the license fees found due; and also for an injunction restraining the defendants from selling any velocipedes, bicycles, or wheels specified in the several licenses without affixing or stamping thereon the word "Patented;" and also that the defendants be enjoined and restrained from making or selling bicycles or other machines described in the said licenses of different construction from those which they are allowed to make and sell by virtue of their several licenses.

Defendants, by their answer, admit the making of the agreements, and the making of reports and payment of royalties up to and including the month of February, 1883, and their refusal to make such reports and pay royalties since that time. They allege, by way of defense, that the several licenses were obtained from them by fraud; that several of the patents mentioned in the licenses were null and void at the time said licenses were granted; that the machines manufactured and sold by the defendants are not covered by any of the said patents, and do not infringe the same; and that the complainant has declared the licenses forfeited; whereby the defendants claim to be released from all obligation assumed by them in said agreements or licenses. Defendants have also filed a cross-bill, in which they seek to have the agreements or licenses in question set aside on the ground that they were obtained by fraud, the fraud charged mainly consisting in the fact that one of the patents enumerated in the licenses had expired at the time the licenses were taken, and others were very nearly expired, but by stating the date of the reissue, instead of the date of the original patent, defendants were induced to believe that the said patents had a much longer time to run than they in fact had; that several of the reissued patents were void by reason of enlarged claims; and that defendants were intimidated by threats of law-suits and injunctions into taking said licenses, and making the agreements therein contained; also that the machines made by the defendants do not infringe the claims of either of said patents, when said patents are properly understood and construed by the state of the art; and, further, that two of said patents have been declared void by a court of competent jurisdiction since said agreements were made. The prayer of the cross-bill is that the agreements be set aside, and the defendants released from all obligation to observe the same, and for an injunction restraining the defendants in the cross-bill from asserting said patents as against the complainants in the cross-bill.

The original bill alleged the making of another agreement described as "Exhibit A," and another is described as "Exhibit I;" but as the proof shows that defendants were released from the payment of royalty under Exhibit A at the time the same was made; and its only purpose seems to have been for the settlement of past claims; and that Exhibit I contained a clause allowing the defendants to revoke or cancel the same, of which they availed themselves soon after this bill was filed,—it is not deemed necessary to consider them further.

Soon after the filing of the original bill, on motion of complainant, an injunction was ordered unless the defendants should file a bond in the penal sum of \$12,000, conditioned for the payment of royalties, with interest and such damages as the court should find on the hearing had accrued up to the date of the order; and also that the defendants should report to the complainant each month after the date of the order the number and kind of machines made by them under the several licenses held by the defendants from the complainant, and pay into court, or to complainant, the royalties accruing after the date of such order. Defendants filed the bond called for by this order, and have reported from month to month in pursuance thereof, and no exception has been taken to the correctness of these reports.

The first, and, substantially, the only, question raised by the defendants in the original bill is that the complainant has a complete remedy at law, and therefore a court of equity has no jurisdiction. Upon this point I think the case made by the bill showing an agreement by which the defendants were to report monthly the number of machines made under their licenses, and a covenant not to make machines, except of a certain description, and not to dispute the validity of the patents mentioned in the licenses, and that the defendants had violated their agreements in all these particulars, makes a clear case for the interposition of a court of equity. The covenant to make monthly reports is, in fact, a covenant for a monthly discovery by defendants of the work done by them under the complainant's patents. The licenses do not, any of them, purport to give the defendants an unlimited use of any of the patents, but only a restricted right to make machines of certain sizes and descriptions; so that when defendants made machines not in conformity to the licenses, they violated, not only their express covenant not to do so, but also the complainant's patents, or some of them, covering such machines.

As to the allegation in the answers that the licenses had been forfeited by the complainant before the commencement of these suits, and the defendants are thereby relieved from the obligation resting upon them therefor, it is sufficient to say that by the terms of the licenses complainant was empowered to terminate them by "notifying defendants in writing that their said licenses had been revoked." The proof in the case fails to show that any such notice was ever given by the complainants. The only element of proof bearing upon

this question is a postal card written by one of the officers of complainant to defendants, dated March 13, 1883, reading as follows: "Your royalty return for February has not come to hand. Failure to forward same within five days from March 10th subjects your license to revokement." This paper falls far short of a notice in writing of a revocation or termination of the licenses, and was evidently written for the purpose of cautioning defendants in regard to the danger they incurred by neglecting to make their monthly reports. I think there can be no doubt that if complainant had instituted any judicial proceeding upon the ground that it had revoked this license, and defendants had resisted such claim, any court would have held that the notice in question was not a notice of revokement. This feature of the defense, therefore, I think wholly fails for want of proof.

By the terms of their agreements defendants are estopped, as it seems to me, from denying the validity of the letters patents in question, and cannot be heard to say that the patents were void as long as these licenses remain in force.

This brings me to the consideration of the allegation contained in the cross-bill, as to the procurement by the complainant of these licenses by fraud. The proof as to these allegations of fraud is, in substance, that the complainant, about June, 1879, sent to defendants a printed circular stating that it was the owner of certain patents, giving a list of them, and describing them by the official numbers, dates, and names of the patentees, and stating that—

"The complainants had been advised by eminent counsel that said patents cover broadly the application of a foot-crank to the front axle of a bicycle or velocipede, and the application of such a foot-crank for the entire propulsion of the front axle of a bicycle or velocipede having only one front wheel and handle to guide the same. We hereby give notice that we shall proceed against any and all parties who infringe either of said letters patent, or who, without authority or license from us, make, use, or sell any velocipedes or bicycles constructed substantially like either of the improvements set forth and described in said letters patent; that suits have already been brought in the several circuit courts of the United States against infringers; and, in each case, the said patents have been sustained, and the infringing parties have recognized the validity of said patents, and, in some cases, have taken out licenses and paid royalty, and, in others, have stopped the manufacture of the same."

On July 28, 1879, complainant wrote defendants a letter as follows:

"We desire to call your attention to the fact that you are infringing our letters patent as per inclosed printed circular. We do not suppose that you intended to willfully disregard our rights, but, rather, from want of knowledge that we had a valid claim. Should you desire to continue to work under our patents, we think we can agree upon a satisfactory settlement for past damages, and grant you a license for future use."

On September 8, 1879, complainant's attorneys wrote defendants as follows:

"We are instructed by our clients, the Pope Manufacturing Company, to inform you that unless immediate settlement is made for the infringement of velocipede patents owned by them suit will be commenced against you. The

inclosed lists will inform you of the patents referred to. We are authorized to make settlement with you, and give you a license, if you desire to do so, without litigation, on terms which you can learn by calling at our office. Unless settlement is made within ten days from the date hereof we shall proceed to commence suit against you for infringement at once. We think, however, the terms we are authorized to propose to you are such you will have no hesitation in settling."

The proof shows that the list of patents included in both these letters was the same as that in the June circular. On October 6, 1879, the "License B" was taken by defendants, and a full settlement made of the matters called for by the license, Exhibit A.

It is now urged that as reissued patent No. 3,319 had expired on August 12, 1879, and because several of the other patents had been reissued with extended claims, and under the recent rulings of the supreme court might have been successfully resisted, therefore the whole transaction is fraudulent and void, not only as to the agreement of October 6, 1879, but those subsequently made in July, 1881, November, 1881, and February, 1882. There is no pretense or proof that the complainant did not own these patents at the time the circular of June, 1879, was sent out. The patents themselves were a matter of public record of which the defendants, as well as the entire public, were bound to take notice. The circular gave the defendants full and explicit information as to the claims of the complainant to those patents, and they had from June to October in which to investigate and determine for themselves as to the alleged infringement and the validity of the several patents. The mere fact that the owner of a patent alleges an infringement, and threatens suit unless a settlement is made with him, cannot be held to make such settlement void for fraud or intimidation. These parties stood in no relation of confidence which entitled the defendants to accept the statement of complainant upon the mixed questions of law and fact in regard to the validity and scope of its patents. The parties were dealing at arms-length. The defendants were given their choice between accepting the terms offered by the complainant and a lawsuit. They had time enough allowed them for investigation and reflection. The fact that they feared the result of litigation upon their business, and therefore settled, is no support of the charge of fraud. Any infringer could escape his settlements and liability for a patent if such a defense were admissible. There is no proof whatever that the complainant, or its officers, acted in bad faith. The mere fact that the Smith patent, No. 3,319, had actually expired when the settlement was effected, although it was in force when negotiations commenced, does not, as it seems to me, taint the transaction as fraudulent. In the first place, if it was a valid patent, and the defendants had used it, they were liable to damages up to August 12, 1879, when it expired. In the second place, the patent was in force when the circular was sent out, and as the proof shows the complainant had previously issued quite a number of licenses to others, undoubtedly the

blank agreement was prepared while the patent was in force, and by mere inadvertence this patent was not crossed off the list when the license was issued. And, finally the date or the duration of this patent was a matter of public record, which the defendants were as much bound to know as the complainant or its officers. No attempt at concealment seems to have been made which can be claimed to be a fraud.

It is further urged that this "dead patent," as it is called, was the principal and broad patent controlling the use of important elements in the construction of velocipedes, and that the opinion of "eminent counsel" referred to in the circular was based on this patent alone. While there is no proof in the record as to which of the 13 patents described in this circular was considered by the counsel who gave the opinion referred to, it is a sufficient answer to this suggestion that the patent undoubtedly was in force and properly considered when the opinion was given; and if it had expired before the defendants closed their treaty with the complainant, the defendants were as much bound to know it as the complainant. If the complainant had demanded instant settlement without time to examine or take the advice of counsel as to the scope or validity of the patents in question, or the opinion of experts as to the fact of infringement, there would be much more moral force in this line of argument; but the matter was not pressed with any undue or unconscionable haste. The time, from June to October, which was allowed to defendants to examine the entire field seems to me to have been liberal and sufficient.

It is further urged that two of the reissued patents were held void by the learned circuit court judge of the Sixth Circuit, (*Pope Manuf'g Co. v. Marqua*, 15 Fed. Rep. 400;) but this decision was rendered more than a year after the last license now in question was made, and after the supreme court of the United States had, in *Miller v. Bridgeport Brass Co.*, 104 U. S. 350, taken a radical departure from the rule formerly held by that court as to the validity of the reissue. At the time the first license was taken, the general rule followed by the courts, and acted upon by the public, in reference to reissued patents, was that a reissue taken at any time for expanded and enlarged claims was valid if the foundation of such claims could be found in the specifications, or even the specifications aided by the drawings; and, with the law thus expounded, it would certainly be harsh to charge the holder of a reissued patent with fraud for asserting its validity, and claiming damages for its infringement. The *Bridgeport Brass Co. Case* had been decided by the supreme court when the later licenses were taken, and the defendants had as many facilities as the complainant for determining whether this patent came within the rule declared in that case.

It is urged, however, that the decision of the circuit court of the Southern district of Ohio that these two patents are void, amounts to an eviction, and, as I understand the argument of the learned coun-

sel for defendants, invalidates all the agreements for licenses in which this patent was included with the others. I cannot agree with the learned counsel as to this conclusion. In the first place, that adjudication is binding only on the parties to that suit, and does not affect the relation between the parties to this contract; and, secondly, the licenses in question included a large number of patents, and provided that defendants should pay a stipulated royalty on all machines made by them "embodying in their construction or mode of operation the inventions and improvements shown and described in each, all, or either of said 'letters patent.'" My construction of this clause of the agreement is that so long as the defendants used all or either of these patents, while the patents remained in force, they were liable to pay royalty according to their contract; but when the patents expired by lapse of time, so that the machines described in one or more of the licenses could not be made without embodying the construction or mode of operation shown in any of the patents covered by the licenses, the obligation to pay royalty under such licenses ceased, on the well-accepted principle that the license terminates with the patent. But these patents are not, in my opinion, "dead," as between these parties, merely because the judge in another circuit has held them void in some suit before him between different parties. By taking the licenses, these defendants waived and abandoned their right to contest the validity of these patents, or any of them, and agreed to pay the stipulated license fees; and merely because some one else has successfully contested the validity of one or more of these patents the defendants are not relieved from their obligations. The alternative to settle or litigate seems to have been fairly tendered them, and they chose to settle, and cannot now retreat from the settlement they made.

Much time was devoted by the learned counsel for defendants in his brief and argument to the discussion of the effect of the prior art in limiting the scope of the claims of these patents, and even urging a want of patentability in the devices covered by some of them for want of novelty. These questions, it seems to me, are all foreclosed. By the defendants taking the licenses they admit the validity of the patents, and the only question left open for them is whether the machines made by them are within the terms of the claims in the patents. They have waived all questions of limiting or escaping the claims by the prior art by their agreement embodied in the license; but if they have not made this waiver by their license, they have done so by their reports made in pursuance of the second clause of the licenses, as this clause required them to report monthly "all machines containing said improvements," and by making such reports they have admitted that the machines herein mentioned contain said improvements.

Without further discussion of the testimony of the defendants in support of their answer and cross-bill, I will say that I do not think

the ground taken by the defendants for annulling these licenses is supported by the proof, or sanctioned by the rules governing the relations of the parties; nor do I think that the proof shows that the complainant has ever canceled, or intended to cancel or terminate, these licenses, nor the provisions which they respectively contain.

Upon the question whether the defendants have manufactured machines prohibited by their agreement, for which the complainant should have damages awarded, the proof is not satisfactory as the record now stands, and a reference may, therefore, be had to ascertain what machines the defendants have so made in violation of their agreements, and which are now covered by the complainant's patents yet in force, or which were yet in force after the making of said agreements, and before the patents expired, if they have expired.

I am not advised as to whether the defendants have paid complainant the amounts shown and called for in their monthly reports made under the order of court entered January 21, 1884, or whether they have paid the amounts so reported into court or not.

CHASE and others v. TUTTLE and others.¹

(Circuit Court, N. D. New York. April 5, 1886.)

1. PATENTS FOR INVENTIONS — INJUNCTION — CIRCULARS CHARGING INFRINGEMENT.

An injunction to restrain defendants' use of circulars charging infringement of their patent by complainant, and threatening the trade with infringement suits, refused, where the question of infringement had never been decided, and where it was not shown that the statements of the defendants were false or fraudulent.

2. SAME—JURISDICTION.

The court had grave doubts whether it had jurisdiction for the purpose of granting an injunction to restrain the use of circulars charging infringement of patents.

3. SAME.

Although an opinion stated in a circular may be erroneous, an injunction will not be issued to restrain the use of such a circular, where it is not shown that the statements contained in it are false or fraudulent.

4. SAME—SUGGESTION AS TO CIRCULARS.

The court suggested that it would perhaps save misunderstanding if the defendants in the future should attach to their circulars a cut of the harrow covered by their patent, in order that persons charged with infringement might act intelligently.

The defendants in this case had brought suit against the complainants under the Garver patent for spring-tooth harrows, and alleged that the complainants' "Clipper" spring harrow was an infringement. After that suit was commenced defendants issued circulars notifying the trade that such suit had been brought, and warning all dealers that if the case was decided in their favor they would hold all infringers liable to the full extent of the law. Complainants thereupon filed this bill, and asked an injunction to prevent the continued issue of circulars by defendants, which circulars complainants alleged to be false, as they contended that their "Clipper" harrow did not infringe the Garver patent. One defense made against the motion for an injunction was that a court of equity had no power to issue an injunction to prevent the continued use of circulars alleged to be a slander upon complainants' title to make their harrow.

John R. Bennett, Fred. G. Fincke, and N. H. Stewart, for the motion.

Charles H. Duell, opposed.

COXE, J. The question whether or not the harrow manufactured by the complainants, and known as the "Clipper" spring harrow, is an infringement of the Garver patent, has never been judicially decided. The complainants contend that it does not infringe; the defendants are equally persistent in their assertion that it does. Neither have been slow in expressing their opinions, or parsimonious in the use of notices and circulars setting forth in plain and vigorous

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

language their respective views upon the proposition at issue. Upon these papers, however, it cannot be successfully maintained that the defendants have made false or fraudulent statements regarding the complainants or their property. They have freely expressed their opinion, and this opinion may be an erroneous one; but nothing beyond this is shown. Assuming, then, that the court has jurisdiction,—and the examination I have been able to give to the subject leaves a very grave doubt in my mind upon this question,—the motion must be denied for the reason that the defendants have done nothing illegal or fraudulent in advertising their harrows.

It would, perhaps, save misunderstanding if the defendants, in the future, should attach to their circulars a cut of the harrow covered by the Garver patent in order that persons charged with infringement may act intelligently. The court can advise this course, but cannot compel it.

The motion is denied.

NEW YORK BELTING & PACKING CO. v. MAGOWAN and others.¹

(Circuit Court, D. New Jersey. March 5, 1886.)

1. PATENTS FOR INVENTIONS—INJUNCTION AFTER PATENT EXPIRES.

Courts are authorized to grant an injunction, after the expiration of a patent, to restrain the sale of infringing articles made during its term, and often exercise such authority when the circumstances warrant it.

2. SAME—WHAT CIRCUMSTANCES JUSTIFY INJUNCTION.

Where the defendants were advised of the claim that their manufacture was an infringement of complainant's patent, and a suit was pending for such infringement, *held*, that there was a proper case or interference, by injunction, after the patent expired, to restrain the selling of infringing articles made during its term.

On Settlement of Decree.

Turner, Lee & McClure, for complainant.

F. C. Lowthorp, Jr., for defendants.

NIXON, J. The question raised in this case is whether, after the expiration of the patent sued on, the court ought to include in the decree an injunction against the defendants' using or selling the infringing articles manufactured by them during the life of the patent. The bill of complaint prayed for an injunction, and for an account of profits and damages. On filing the bill, an application was made for a preliminary injunction, affidavits were put in by the defendants, which suggested a doubt concerning the validity of the complainant's invention, and, as the defendants were pecuniarily responsible, the

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

court denied the injunction, but required a bond and monthly statement, under oath, of the sales. Before a final decision of the suit was reached on the merits, the patent expired. The defendants now object to any injunction restraining them from selling any of the vulcanized rubber packing, infringing the patent of the complainant, which was manufactured by them previous to January 26, 1886, the date of the expiration of the patent.

The counsel for the complainant is not quite correct in assuming that it is the ordinary rule to grant the injunction in all such cases; but courts are authorized to do it, and often exercise their authority when the circumstances warrant it. *Root v. Railway Co.*, 105 U. S. 189. In *American Diamond Rock-boring Co. v. Rutland Marble Co.*, 2 Fed. Rep. 356, Judge WHEELER, in discussing the propriety of such action, says:

"The grant to the patentee was of the exclusive right to make, use, and sell to others to be used, the invention, during the term. The right to exclude others from making, using, and selling was the essential thing, and really all that was granted. * * * Any making for use during the term was taking from him what belonged to him. To permit any others to make such machines during the term, and hold them till the expiration, and then use them freely as if made after, would be to permit them to make off with so much of his (the patentee's) property that the law had granted to him."

See, also, to the same effect, *American Diamond Rock-boring Co. v. Sheldon*, 1 Fed. Rep. 870.

The English equity practice is the same, as shown in *Crossley v. Gas-light Co.*, 4 Law J. Ch. (N. S.) 25, in which LYNDEHURST, L. J., said:

"It was objected that the court would not interfere, etc. The point has never yet been decided; but I am of the opinion that the court would interfere, after a patent had expired, to restrain the sale of articles manufactured previous to its expiration, in infringement of a patent-right."

I think this is a proper case for interference. A suit was pending against the defendants, and they were advised of the claim of the complainants. With their eyes wide open, they went on, and agreed to take the consequences. The consequences may be serious, but if they had wished to avoid them they ought to have refrained from such manufacture until the issues raised by the pleadings had been determined.

BURDETT and another v. WILLIAMS and another.¹

(District Court, D. Connecticut. March 22, 1886.)

1. SEAMEN'S WAGES—WHALING VOYAGE—ACTS JUNE 9, 1874, AND JUNE 20, 1790, §§ 4520, 4568, REV. ST., CONSTRUED—FAILURE TO DELIVER ENTIRE CARGO—DEVIATION AND DELAY, WHEN JUSTIFIABLE—CONSTRUCTION OF SHIPPING ARTICLES.

The libelants signed shipping articles which were partly written and partly printed. The printed part of the paper was the usual "whalemen's shipping paper," and described the voyage as a "whaling voyage from the port of New London to Cumberland inlet and elsewhere." The seamen's wages were called "shares of the net proceeds." The written part of the contract was as follows: "It is also further understood and agreed that we are to receive monthly wages as set opposite our names, in lieu of our lays in freight earnings, from the time that the said schooner leaves the port of New London until all freights are discharged, and all freight is taken on board at A., C., and N. If, on taking on board all freights at above-named stations, the vessel has not sufficient quantity, say from six to seven hundred barrels, then our wages are to cease, and we are to stop to whale at N. or elsewhere, and receive the lays set opposite our names on all catchings taken after such date in lieu of wages; but if the quantity taken on board is sufficient to come home, then our wages are to continue until arrival of vessel at New London, fall of 1884." *Held* that, by the terms of the contract, monthly wages were to be paid in lieu of a lay in freight earnings, and if the vessel got enough freight to fill her, monthly wages were to be paid continuously, and the vessel was to return in the fall of 1884. If a sufficient quantity of freight was not received, whaling was to begin, and monthly wages were to cease; and, from the surrounding circumstances, it also appeared that no contract was made that the whaling voyage should cease in the fall of 1884.

2. SAME—ACT OF 1874—REV. ST. § 4520.

The shipping articles were not void for non-compliance with the shipping commissioners' act, which, by the act of June 9, 1874, do not apply to vessels in the trade between the United States and the British North American possessions, or in any case where the seamen are entitled to participate in the result of a voyage. The shipping agreement was not in violation of section 4520, Rev. St.

3. SAME—DEVIATION—SHORT ALLOWANCE OF PROVISIONS—MONTHLY WAGES.

After the delivery of freight had ceased, and whaling had commenced, the vessel and crew, on account of stress of weather, and not by the negligence of the captain, were compelled to winter in Davis straits, and did not return till the fall of 1885. Meanwhile, they shared their 17 months' supply of provisions with a shipwrecked crew. Provisions grew scarce, and for a time they were on short allowance. The voyage was unsuccessful. No catchings were to be divided, and the libelants returned penniless. There was a deviation to St. Johns, Newfoundland, to land the shipwrecked crew, and to refit. *Held*, that the crew were not entitled to monthly wages, or to extra wages on account of short allowance of provisions, they having been diminished by delivery to a crew in distress, without the fault of the respondents. *Held, also*, that the circumstance that the respondents were unable, without peril to life, to deliver at Cumberland inlet a small and immaterial part of the cargo, could not be taken advantage of by the libelants as a ground for extending the period wherein monthly wages were due.

In Admiralty.

Thomas A. Codd and E. L. Barney, for libelants.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Samuel Park, for respondents.

SHIPMAN, J. This is a libel *in personam*, claiming seaman's wages, and damages for short allowance of food, and for an unnecessary and wrongful detention for nearly 10 months in the waters of British North America. Francis H. Yon, Thomas J. Kelly, and Isaac D. Sampson have, by petition, become co-libelants since the libel was filed. The facts in the case are as follows:

In the spring of 1884 the respondents, C. A. Williams & Co., were the owners of two whaling vessels, the Roswell King and the Lizzie P. Simmons, which were then on whaling voyages upon the east coast of British North America. The King had been there two years. Neither vessel had been heard from for 18 months, and neither was expected to return home during that season. The respondents were also owners of the whaling schooner Era, and during that spring fitted her out thoroughly, with 17 months' provisions for 23 men, with a whaling equipment, with provisions and stores for the Roswell King, and with two casks containing whaling lines, an anchor, rigging, and sail for the Simmons. The object of the voyage was to carry the above-named freight to the two vessels, and to bring home whatever oil and bone they had. If not enough freight was received from them to fill the schooner, which would take 600 or 700 barrels, then the Era was to remain upon a whaling voyage.

Early in June, 1884, John O. Spicer, one of the respondents, with the captain, Timothy F. Clisby, and the second mate, shipped a crew at New Bedford for the voyage of the Era. Each one of the officers and crew intelligently signed a partly printed and partly written shipping paper or contract. The printed part of the paper was the usual "whalemen's shipping paper," and described the voyage as a "whaling voyage from the port of New London to Cumberland inlet and elsewhere." The seamen's wages were called "shares of the net proceeds." The written part of the contract was as follows:

"It is also further understood and agreed that we are to receive monthly wages as set opposite our names, in lieu of our lays in freight earnings, from the time the said schooner leaves the port of New London until all freights are discharged, and all freight is taken on board at stations Arkolea, Cumberland inlet, and New Guneuke. If, on taking aboard all freights at the above-named stations, the vessel has not sufficient quantity, say from six to seven hundred barrels, then our wages are to cease, and we are to stop to whale at New Guneuke or elsewhere, and receive the lays set opposite our names on all catchings taken after such date in lieu of wages; but if the quantity taken on board is sufficient to come home, then our wages are to continue until arrival of vessel at New London, fall of 1884."

This contract was explained to, and was understood by, each of the crew. Monthly wages were to be paid in lieu of the lay in freight earnings, and if the vessel got sufficient freight to fill her, monthly wages were to be paid continuously, and the vessel was to return forthwith in the fall of 1884. If a sufficient quantity of freight was not

received, whaling was to begin, and thereafter monthly wages were to cease. If whaling commenced, it was undoubtedly the hope or expectation of both owners and crew that the voyage would end in six months, but from the provisioning of the vessel for 17 months, her equipment as a whaler, and the well-known uncertainties of the whale fishery, it is manifest that no contract was made that the whaling voyage should cease in the fall of 1884. The number of the crew, and the equipment of the vessel, plainly showed that whaling was one of the intended objects of the voyage; and if the voyage was for whaling, it is not easy to believe that there was any agreement or understanding that it must end in six months. It would have in fact ended in that time if the vessel had not been caught by such stress of weather that she was compelled to winter.

The *Era* left New London on June 10, 1884, and reached Hudson straits in July, 1884, where she was jammed in the ice, and delayed 20 to 25 days. She reached Arkillie about August 28, 1884, and found the *Roswell King* and a crew of 23 men belonging to the shipwrecked schooner *Isabella*, who were being fed by the *Roswell King*. The *Era* discharged all the freight that was destined for the *King*, took on board her cargo, consisting of 118 barrels of oil, between 1,400 and 1,500 pounds of bone, and some skins, the crew of the *Isabella*, and two of the *King's* crew, and started on September 9th for the *Simmons*, at Cumberland inlet, 450 or 500 miles by water from Arkillie. There was a head wind, and at the request of the *Isabella's* captain her crew were put ashore at New Guneuke on September 15th. A tent was built, and provisions were left for them. The *Era* was delayed somewhat by bad weather, and started again for Cumberland inlet on September 24th, and three times got within 40 miles of her destination and was blown back. The ice was 18 inches thick upon her deck. The captain consulted with his officers, and all agreed that if he undertook to keep on his course the vessel would be unmanageable. The *Era* turned back, reached New Guneuke on October 4, 1884, and commenced whaling on the same day, when monthly wages stopped. Three boats were fitted out for whaling. All were unsuccessful, and the captain returned on October 24th, and started to go home on the same day, with the *Isabella's* crew on board, when he decided, upon consultation with the *Isabella's* officers and his own, that it was unsafe to attempt leaving the harbor. He concluded, from examination, that the heavy pack ice had commenced to come down the straits, and to shut in, and, if so, that he could probably never return to his harbor. In this opinion the captain of the *Isabella* concurred. No one contradicts the wisdom of this conclusion. The objection which is made to the captain's course is that he was negligent, and ought to have known earlier that the ice was filling the straits, and ought not to have been caught.

Upon the evidence, there can be no affirmative finding of negligence. The next winter the *Era* left her anchorage October 28th,

and Capt. Spicer had left in different years on November 4th, 6th, and 7th, and found no pack. Capt. Clisby has been master of the *Era* twice, and of the *King* once; has made five voyages to British North America; and was caught in the ice, and wintered there the winter of 1883-84. When the desirableness of avoiding an Arctic winter; the burdensome necessity, if the *Era* remained, of feeding the *Isabella's* crew; the fact that apparently winter set in earlier at this season than was usual; and the fact that no witness can charge negligence,—are all considered, the only finding that I can properly make from the evidence is that the vessel was detained by stress of weather, without the fault of the captain.

The vessel was put in readiness for the winter as well as they were able. An account of the provisions on hand was taken, and the men were told that they could have a navy ration, or could have what the captain thought best, as they preferred. They decided to take what the captain thought best. The provisions grew scarce, for double the expected number were to be fed. On December 2d the captain sent a dog team, with natives, to the *Simmons* to obtain provisions. None were obtained. On June 28th meat was scarce, and after July 31st the rations were cut down one-half. There was no positive distress on account of lack of food. Thenatives, as is usual, came in numbers, killed seal, walrus, and deer, brought the meat, and, in July, 1885, duck's eggs, and received some of the *Era's* provisions, but brought more than they received. Yon, the cook, had the scurvy very badly, and is now a permanent cripple, as a result. He was imprudent in not taking preventives. Others had also the same disease. The captain properly insisted upon the sailors using raw seal meat and blood, which it is necessary to take, in that climate, as a preventive and cure for the scurvy. The crew suffered from cold and from the melting frost trickling into and wetting their berths, and from all the discomforts of an Arctic winter. They were warmly clad, and could always obtain a sufficiency of warm clothing. Native women were on the vessel, cleaning the skins of the animals which were killed, and preparing them for clothing. Capt. Spicer, who has been sailing in the Arctic regions since 1856, testified that it is possible for a man to live there in the winter without skin clothing, but it is not practicable.

When the natives returned, on December 25, 1884, from the *Simmons*, they reported that she had 100 barrels of seal oil and the bone of a small whale. The whaling season in that latitude is from May to November 1st. Capt. Clisby commenced whaling on May 7th. No whales were caught. The season for leaving the straits in safety is from August to November. The *Era* left its harbor on August 7, 1885, for St. Johns, Newfoundland, to land the shipwrecked crew, to refit, and return; and reached St. Johns on August 24th. Upon the voyage, the captain bought supplies from a passing vessel. At St. Johns the crew of the *Isabella* was left. Yon, the cook, and the boat steerer, who was also sick, were sent home. Two men deserted, and many of

the others were exceedingly unwilling to return to Davis straits, and were mutinous. All finally went with the vessel except the four who have been mentioned.

The *Era* sailed from St. Johns on September 16th, and reached Davis straits about October 1st. Whaling was unsuccessfully attempted till October 28th, when she sailed for home, and reached New London on November 26th with no catchings. The libelants had more than exhausted the monthly wages allowed till October 4th in advances, and supplies from the slop-chest. Each was given enough money to reach New Bedford, and receipts were signed by each except by Yon. It thus appears that the libelants returned penniless after an absence of $17\frac{1}{2}$ months, and the privations of an Arctic winter of between 9 and 10 months. The unfortunate character and result of the voyage naturally incline a court to look favorably upon their case, and to desire to give them an allowance, if it can properly be done.

The theory of the libel is that each sailor had, by the terms of the contract, monthly wages and a lay; that the vessel could have returned in December, 1884, as was contemplated when she left New London; that, in violation of the shipping agreement, the captain remained in northern waters, and the crew were put upon short allowance, and suffered from cold; and that from St. Johns the captain returned to British North America against the will of the libelants, and by fraud and deception. The libelants also insisted upon the trial that the voyage was a freighting voyage; that the shipping articles were not in accordance with the statute, were void, and that, therefore, the seamen could recover the highest rate of wages; that the freight not having been entirely delivered, the men were continuously entitled to monthly wages, and the captain had no right to commence whaling; but, if he did commence, the men should be recompensed for his negligence in being caught in the ice, and thereby being placed upon short allowance.

By the act of June 9, 1874, (1 Supp. Rev. St. 31,) none of the provisions of the shipping commissioners' act of 1872 apply to vessels in the trade between the United States and the British North American possessions, or in any case where the seamen are entitled to participate in the results of a voyage. The shipping articles were not void for any non-compliance with the shipping commissioners' act. Neither was the shipping agreement in violation of section 4520, which requires the agreement to specify the voyage or term of time for which the seamen are shipped. It was known and understood by owners and crew that the voyage was to be a whaling voyage if a full freight was not found. The time when the freighting voyage was to end was stated. From the fact that a whaling voyage is not from port to port, it has never been supposed that this section, which was a part of the act of July 20, 1790, (1 St. at Large, 131,) applied to whaling voyages. 3 Kent, Comm. 179; *The Atlantic*, Abb. Adm. 451; *Taber v. U. S.*, 1 Story, 1.

The point that because the freight for the Simmons was not discharged, therefore the voyage continued to be upon monthly wages, is a very technical one. There were but two hogsheads for the Simmons, and the most vigorous attempts were made to reach her, and were only abandoned on account of absolute necessity. Whatever may be said of Capt. Clisby's imprudence in not trying to reach a home port sooner, he cannot be charged with a lack of courage. He did all, and perhaps more, than was prudent in trying to deliver his freight at Cumberland inlet. It would be a most extreme and an unjust technicality to hold that the delivery of two hogsheads having been necessarily and wisely abandoned on account of peril to life on board the Era if the attempt to deliver them was prolonged, nevertheless the voyage continued to be a freighting voyage until its termination.

No wages are due to the libelants in consequence of the detention at New Guneuke till August, 1885, or on account of short allowance of provisions. The detention, and the consequent privations of the men, occurred from stress of weather, and not from design, willfulness, or negligence. The calamity was incident to navigation in those waters, and was a contingency which must be well understood by those who enter upon a voyage to the whaling region of British North America. The short allowance was due to the delivery of a part of the provisions to a crew in distress. If an ample supply of provisions was taken at the beginning of the voyage, and it became diminished by delivery to a crew in distress, without the fault of the captain or owners, they not having become bound by contract or agreement to continuously furnish a stipulated amount of provisions, the owners are not bound to pay extra wages for such short allowance. No agreement or contract having been entered into in regard to a continuous supply of food, section 4568 of the Revised Statutes does not seem to be applicable to the case. The decisions under the ninth section of the act of July 20, 1790, are instructive upon this part of the case. 2 Pars. Shipp. & Adm. 76.

The decision of Capt. Clisby to go to St. Johns, and to return, rather than to proceed to New London, turned out to be an unfortunate one, and the remaining question is whether the libelants ought to have compensation for the time spent after September 16th. In the contingency of not finding sufficient freight, the voyage was to be for whaling. Whaling voyages to the northern seas, if one winter is spent there, occupy the next brief summer. The equipment indicated that the contingency was in the minds of the owners when they spent their money in fitting out the vessel. Only upon this plan, in the event that the winter was spent in the ice, could there be any chance of profit to owners or crew. The whaling season commenced in May, and would ordinarily continue until November. If the Era had not been obliged to get rid of the shipwrecked crew, and to supply herself with provisions as soon as the weather permitted her to leave Davis straits, a stay until the middle or the last of Oc-

tober would have been the natural course. The voyage to St. Johns to leave the *Isabella's* crew, and to refit, was a proper and not a voluntary deviation. "The seaman is bound to the vessel, so long as she continues on the *iter*; and her being driven from a direct course, or going voluntarily off it for shelter or repair, in no way relieves him from his contract." *Miller v. Kelly*, Abb. Adm. 564.

Let there be a decree dismissing the libel, without costs.

THE SYDNEY.¹

THE WORDEN.

PROVIDENCE WASHINGTON INS. Co. and another v. THE SYDNEY and another.

(*Circuit Court, S. D. New York. March 17, 1886.*)

1. **MARINE INSURANCE—RUNNING POLICY—CERTIFICATE UNDER AND SUBJECT TO THE CONDITIONS THEREOF—"FOR WHOM IT MAY CONCERN"—CONSTRUCTION OF.**
The libelants issued a running policy to H. M. & Co., "on account of H. M. & Co., for whom it may concern." They subsequently, upon the application of H. M. & Co., issued a certificate of insurance under and subject to the conditions of the said policy; loss, if any, payable to the assured, or order. H. M. & Co., by whom the insurance was effected, were intermediaries between boatmen and shippers. A., P. & Co. were the owners of the cargo. The certificate by which the cargo was insured, under and subject to the conditions of the running policy, was obtained by H. M. & Co. at the request of A., P. & Co. The libelants' dealings were entirely with H. M. & Co. In consequence of negligence on the part of the carrier, a total loss ensued. The libelants, upon an abandonment by A., P. & Co. and H. M. & Co. of their interests in the property, paid the insurance in full, and filed a libel against the carrier for negligence. *Held*, that the certificate and policy are to be read together; and when so read, constitute a contract to insure H. M. & Co. for themselves, and for those whom they might represent, having insurable interests in the premises, and that both H. M. & Co. and A., P. & Co. were embraced therein. The intention of the person who effects the insurance, whether known to the insurer or not, determines the application of the clause.
2. **SAME—RIGHT OF INSURERS CLAIMING BY SUBROGATION TO SUE FOR NEGLIGENCE—PAYMENT TO THE ASSURED A PREREQUISITE.**
Payment of a total loss works an equitable assignment of the property, and the insurer may, after payment to the assured, charge the carrier for negligence in destroying property which has become his. The insurer, upon subrogation to the rights of the assured, becomes the real party in interest, and may maintain the suit in his own name.
3. **SAME—NEGLIGENCE—PRESUMPTION—BURDEN OF PROOF.**
When a loss occurs in consequence of an explosion of the boiler, a presumption of negligence on the part of the carrier is thereby created, which those who are responsible must rebut by proof of due care, or by showing the existence of circumstances over which they had no control, and to which the result may be fairly attributable.
4. **SAME—ADMISSIONS IN ANSWER—PRACTICE—ADMISSION OF FURTHER TESTIMONY AFTER HEARING.**
Although the answer denies negligence, it admits facts which raise a presumption of negligence, but as the apostles indicate that the question of neg-

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

ligence has not been fully entered into, and as the claimant has relied upon the theory that the facts found did not make out a *prima facie* case against him, he may be permitted to apply for leave to introduce further evidence in this regard.

In Admiralty.

Edward D. McCarthy, for appellants.

Hyland & Zabriskie, for claimant.

WALLACE, J. The libel in this cause avers, in substance, that the libelants, insurance corporations engaged in the business of marine insurance, did by a policy of insurance agree to indemnify Armour, Plankinton & Co., the owners of a certain cargo of wheat on board the canal-boat Worden, upon a voyage from Buffalo to New York, against the usual marine risks and perils of the voyage; that there was a total loss of the cargo upon the voyage, and an abandonment by the owners to the libelants; that the canal-boat Worden, upon the voyage, was fastened to the steam canal-boat Sydney, and was entirely dependent on the Sydney for motive power; that both the Worden and the Sydney were owned by the same persons; that the loss occurred by the negligence of the persons in charge of the two boats, in consequence of which the Worden was driven upon the rocks of Esopus island, in the Hudson river, and sank; that the libelants became liable to the owners of the cargo in the sum of \$9,211.75 as for a total loss, and paid that sum to them as the insurance upon said cargo, whereby libelants became subrogated to the owner's cause of action against the vessels. The answer of the claimant admits that he was the owner of both vessels; denies that the libelants insured the owners of the cargo of the Worden; alleges that the policy insured the claimant as carrier of the cargo; denies all averments of negligence; admits that the Worden, while being towed by the Sydney, and while entirely under the control and management of the Sydney, struck the rocks upon Esopus island, and sunk; admits that these were well-known rocks, easily avoidable ordinarily by tow-boats and their tows; and avers that the Worden foundered by reason of the bursting of the boiler of the Sydney, whereby that steamer was unable to control her movements, and was carried by the tide and wind until the Worden struck the rocks. The answer further alleges that the claimant paid the premium to the libelants for the insurance, upon the agreement that the payment of any loss or damage to the cargo *in transitu* should accrue to the benefit of the claimant, and relieve him from his liability for such loss as a common carrier.

The district court dismissed the libel, and upon this appeal by the libelants the following facts are found:

(1) Prior to the seventeenth day of May, 1883, the libelants issued and delivered to the firm of H. Morse & Co. of Buffalo, New York, a policy of insurance, reciting that "on account of H. Morse & Co., for whom it may concern, they do insure the several persons whose names are hereafter indorsed

on the policy as owner, advancer, or common carrier of goods, merchandise, or produce on his own boat, or boats belonging to others, loaded on commission or chartered, from place to place as indorsed hereon, or in a book kept for that purpose, for the several amounts at the rate and on the goods, merchandise, or produce as specified in the indorsement, beginning the adventure upon the goods, merchandise, or produce from and immediately following the landing thereof at the port or place of the indorsement, and, continuing the same until the goods, merchandise, or produce shall be safely landed at the port of destination." The policy, among other things, excepted from the risk all losses arising from want of ordinary care and skill in lading or navigating the boats.

(2) On the seventeenth day of May, 1883, Morse & Co. applied to the agent of the libelants at Buffalo for insurance upon a cargo of wheat, to be carried on board the canal-boat William Worden from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Co., or order. Thereupon the agent of the libelants entered in the book a memorandum designating Morse & Co. as the persons on whose account insurance was effected, describing the boat, cargo, and voyage, and specifying the amount insured upon the cargo on the voyage, from Buffalo to New York, as \$9,875, and the premium as \$14.82. At the same time the agents of the libelants delivered to Morse & Co. a certificate certifying that Morse & Co. were insured under and subject to the conditions of the policy before mentioned, in the sum of \$9,875 on cargo of wheat on board boat William Worden from Buffalo to New York, loss, if any, payable to assured, or order.

(3) At the time when the foregoing policy and certificates were executed and issued by the libelants, Morse & Co. were doing business at Buffalo as intermediaries between boatmen and shippers of cargo in procuring cargoes to be shipped for a commission. They were applied to by the owner of the canal-boat Worden to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Co. for a cargo, and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat Worden, and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the Worden, evidenced by a bill of lading, in which they were described as shippers of the cargo for transportation of the cargo to New York, and procured the certificate of insurance aforesaid, and indorsed and delivered to the agent for Armour, Plankinton & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading in which they described themselves as carriers, and Armour, Plankinton & Co. as shippers.

(4) At the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co. the claimant, as master of the Worden, also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent.

(5) By the agreement for the transportation of the cargo between Morse & Co. and the claimant, the latter was to receive five cents per bushel as freight, less the amount to be paid as premium for insuring the cargo, and less a commission of 5 per cent. upon the whole freight money to Morse & Co.

(6) Morse & Co. advanced to the agent of Armour, Plankinton & Co. \$200 for prior advances made by the agent upon the wheat, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight.

(7) At the time of making application for the insurance, receiving the certificate, and signing the several bills of lading, it was understood between Morse & Co. and the claimant that the latter owned the Worden and the Sydney, and intended to tow the Worden by the Sydney on the voyage.

(8) Upon the voyage the Worden was wholly under the control of the Sydney, and both boats were navigated as one vessel practically; and on the twenty-eighth day of May, 1883, while proceeding on the voyage down the Hudson river the Worden struck the rocks on Esopus island, and sunk, and her cargo was damaged to the amount of \$6,175.89. These were well known rocks, easily avoidable by vessels.

(9) There is no evidence of any negligence on the part of those in charge of the navigation of the Worden or the Sydney, except such as appears from admissions in the answer of the claimant.

(10) June 26, 1883, the libelants paid to Armour, Plankinton & Co. the sum of \$9,211.75 on account of the loss of the cargo insured; and upon an abandonment by the owners to the libelants, and about the same time, they paid to Morse & Co. the sum of \$520, in full for their interest in the cargo.

It is to be observed that the cause of action upon which the libel proceeds is for negligence. It is not claimed that the vessels, or either of them, are liable because of a breach of the carrier's contract. The libelants assert that they have succeeded to the rights of Armour, Plankinton & Co., as the owners of the cargo of the Worden, to recover against both boats because of loss sustained by reason of the negligent navigation of the boats. There is no allegation in the libel that the libelants have succeeded to the rights of Armour, Plankinton & Co. by an assignment of the cause of action. The libelants rely purely upon subrogation. The case consequently presents two questions: *First*, whether upon the facts a cause of action existed in favor of Armour, Plankinton & Co. against one or both of the vessels at the time of the payment to them of the loss by the libelants; and, *second*, whether the libelants stand by subrogation in the place of Armour, Plankinton & Co. to enforce that cause of action. If Armour, Plankinton & Co. were not entitled to the insurance, as between themselves and the libelants, under the policy and certificate, the libelants cannot recover.

Treating the case as though Armour, Plankinton & Co. were libelants, their right to recover against the vessels would not be affected by the fact that they had been paid the full amount of their loss by the insurers. *The Monticello*, 17 How. 152. If the insured owner has accepted payment from the insurer, the latter may use the name of the assured to obtain redress from the persons whose conduct caused the loss. At law, the insurer, upon subrogation to the rights of the assured by payment of the loss, can only maintain such a suit in the name of the assured. *Gales v. Hailman*, 11 Pa. St. 515; *Hart v. Western R. Co.*, 13 Metc. 99; *Hall v. Railroad Cos.*, 13 Wall. 367; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173. In admiralty, however, there seems to be no reason why the insurer may not, as in equity, maintain the suit in his own name as the real party in interest. *Fretz v. Bull*, 12 How. 466; *The Monticello v. Morrison*, 17 How. 155. As the libelants have paid Morse & Co. for their interest in the loss all the parties whose rights are involved are before the court.

Although the answer denies negligence in the navigation of the

vessels; it admits facts which raise a presumption of negligence. It admits that the Worden, while upon her voyage on the Hudson river, was propelled against well known rocks, and alleges, in exculpation, that this took place because the vessel became unmanageable in consequence of the bursting of the boiler of the Sydney. As both the vessels were navigated as one, and were owned by the claimant, the case is to be treated as though the libel were filed against the Sydney alone, and as though a vessel, having the power to move or stop at pleasure in a channel of sufficient breadth, were charged with negligence by reason of being brought into collision with a well-known obstruction easily avoidable by those in charge. In the absence of any explanatory evidence to indicate that the accident was one which could not be foreseen or prevented by the exercise of proper nautical skill, the facts admitted establish a *prima facie* case of negligence. *The Granite State*, 3 Wall. 310; *Orient Ins. Co. v. The Saunders*, 25 Fed. Rep. 727. No evidence has been offered in support of the exculpatory allegations of the answer. Even had it been shown that the accident was occasioned by the explosion of the boiler, and that, after such explosion, the Worden could not have been saved from being driven with such violence upon the rocks as to sink her, it would still have been incumbent upon the claimant to show that the boiler was in a safe condition, and was properly managed. Boilers do not usually explode when they are in a safe condition and are prudently managed, and the fact of an explosion therefore creates a presumption of negligence, which those who are responsible for the consequences must overthrow by evidence showing due care, or the existence of circumstances over which they have no control, to which the result may be fairly attributed. *Transportation Co. v. Downer*, 11 Wall. 129; *The New World v. King*, 16 How. 477; *Rintoul v. New York Cent. & H. R. R. Co.*, 21 Blatchf. 439; S. C. 17 Fed. Rep. 905; *Mullen v. St. John*, 57 N. Y. 567. In the case of *Rose v. Stevens & Condit Transp. Co.* it was held in this court that negligence may be inferred from the fact of the explosion of a steam-boiler on a vessel, even where the defendant is under no contract obligation to the plaintiff. 20 Blatchf. 411, and 11 Fed. Rep. 438. It follows that a sufficient case was shown to authorize a recovery by the owner of the cargo against the vessels.

Assuming that Armour, Plankinton & Co. could recover upon the proofs if they were libelants, it remains to consider whether the libelants became subrogated to their cause of action. The rule is elementary that payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the others for the loss. The question is, then, whether Armour, Plankinton & Co. were insured to the extent of their interest as owners of the cargo, under the policy and certificate issued by the libelants to Morse & Co.

The contract of insurance is found in the policy and certificate, supplemented by such extrinsic evidence as may be properly received to explain but not to contradict their terms. The policy is a running or floating policy, intended to cover future shipments of goods or produce. Its phraseology respecting the persons and interests to be insured is somewhat equivocal, owing doubtless to the fact that the words "on account of H. Morse & Co. for whom it may concern," were written into the printed form adapted to insure all persons who might become parties to it by indorsing their names thereon. By its terms, the voyage, the amount to be insured, the property, and the rate of premium are to be described by an indorsement upon the policy or in a book kept for that purpose; such indorsement to be approved, and signed by the libelants. It is to be read as though the libelants undertook to insure Morse & Co. for themselves and those whom they might represent in procuring insurance, and also undertook, at the request of Morse & Co. to insure any other persons having an interest as owners, advancers, or common carriers whose names and interests should thereafter be indorsed upon the policy. When the names of Morse & Co. were inserted in it, it was appropriate to meet the different classes of transactions which an insurance by them might represent. It was such as would enable them to effect an insurance in their own name when they had any interest in the risk as advancers or carriers, or to obtain insurance for the owner, advancer, or carrier, and in his name, if they desired or had no interest themselves. Upon the correct construction, insurance effected in the name of Morse & Co. was to inure to the benefit of all concerned,—that is, for the benefit of all for whom they acted in obtaining insurance; and when insurance was not effected in the name of Morse & Co. the name of the person to be insured, with a statement of his interest, was to be indorsed on the policy, and he would thereby become the assured. Upon any other construction the words "for whom it may concern" are nugatory. Insurance in the name of another might sometime be desirable when Morse & Co. had no interest in the transaction other than that of agent for procuring cargoes, and insurance upon them, for others for a commission.

No indorsement was made upon the policy of the name of the person insured; but upon the application for the insurance the memorandum of the property, the voyage, the amount of insurance, and the rate were entered by the libelants in the book kept for that purpose as recited in the certificate delivered by them to Morse & Co. The certificate and policy are to be read together, and, so read, form a contract between the libelants and Morse & Co. to insure the latter "for whom it may concern." This was an insurance for Armour, Plankinton & Co. to the extent of their interests as owners of the cargo, because the proofs show indisputably that Morse & Co. obtained the insurance at the request and for the protection of Armour,

Plankinton & Co. It was also an insurance for the benefit of Morse & Co. to the extent of their interests as carriers and for advances.

Although the general rule is that, if a policy insures the interest only of the person named in it, no other person can show that it was also intended to cover his interest, it is otherwise if the policy contains the phrase "for whom it may concern;" and under such a policy the intention of the person who effects the insurance determines the application of the clause. The insurance effected by him insures all who have an insurable interest in the property to the extent of their interests, where there is previous authority or subsequent ratification of an insurance obtained for them. This is so whether the intention of the person effecting the insurance is known to the insurer or not; and the persons whose interests are thus insured may sue upon the policy in their own name, and a recovery by one inures to the benefit of all, and bars a recovery by the others. The phrase ordinarily applies, however, only to those who are contemplated at the time of the insurance, and who then had an insurable interest in the subject-matter. 1 Pars. Ins. 45; *Hopper v. Robinson*, 98 U. S. 528; *Henshaw v. Mutual Safety Ins. Co.*, 2 Blatchf. 99; *Hermann v. Louisiana State Ins. Co.*, 7 La. 502; *Duncan v. Sun Ins. Co.*, 12 La. Ann. 486; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

It is not apparent how the libelants, after payment of the loss to Armour, Plankinton & Co. maintained any different position, in respect to their rights to recover against the vessel, than would have been occupied by Armour, Plankinton & Co. if the suit had been brought by them before payment of the loss. The libelants did not, by paying the loss, admit, in favor of the claimant, that the loss was one within the risk of the policy, and therefore not within one of the accepted risks as a loss arising from the want of ordinary care in navigating the boat. They were obliged to pay the loss to Armour, Plankinton & Co. before they could assert any claim against him. When they paid it, they became Armour, Plankinton & Co. for the purposes of enforcing the cause of action. They would doubtless be precluded from maintaining an action against Armour, Plankinton & Co. to recover back the payment unless they could show fraud or mistake. But it is impossible to see how this circumstance can prejudice them in an action against a third person. Moreover, if the payment should be treated as an admission on the part of the libelants of their understanding, at the time, that the loss was one within the terms of the policy, and did not arise from an accepted risk, nevertheless the evidence now is that the loss arose by reason of the negligence of those in charge of the vessels.

The decision in the court below, as appears by the opinion of the learned district judge, was placed upon the ground that the insurance effected by Morse & Co. was an insurance for themselves only; but, if otherwise, was intended by them to cover the insurable interest of

the claimant in the cargo as a carrier; that the insurance therefore insured to the claimant's benefit as well as to that of Morse & Co. and Armour, Plankinton & Co., and protected him to the extent of his liability as carrier for the delivery of the cargo to the owner; and that payment to the owner was, in legal effect, payment to him, and concluded the insurers from maintaining the suit without affirmative allegations and proof that the payment was made upon a mistake of facts.

If Morse & Co. were the only parties insured, the libel was properly dismissed, if for no other reason, because it does not proceed upon the theory that the libelants have succeeded to any rights by subrogation except to those of Armour, Plankinton & Co. But the conclusion that Morse & Co. were the only parties to the contract can only be reached by refusing to give any effect to the phrase in the policy "for whom it may concern." That phrase is meaningless if it does not mean that an insurance effected in their names is to extend to all for whom they are authorized to insure. If the policy were to be interpreted as intended to insure only those persons whose names and interests should be indorsed upon it, then it would read as though the phrase "on account of Morse & Co., for whom it may concern," were altogether omitted. With the phrase inserted, it is unnecessary to indorse the name subsequently upon the policy, but all become parties, "for whom it may concern," to any insurance which may be effected upon their application. Upon any other construction of the policy it would have been useless to insert the name of Morse & Co. in the policy at all.

If the libelants were attempting to enforce a cause of action against the claimant for a breach of his obligations as a carrier, and if they had insured him as carrier, as well as Morse & Co. and Armour, Plankinton & Co., it would seem very clear that they could not succeed. In such a case they would be attempting to reclaim moneys which they had agreed to appropriate in part for his indemnity against the very loss which had arisen,—a fund which became his to an extent commensurate with his obligations as a carrier as soon as the loss took place. But they do not seek to recover back money which they have paid him, or paid to some one else in part for him, in discharge of their contract of indemnity. They seek to charge him for negligence in destroying the property which has become theirs by an equitable assignment from the owner.

The proofs do not show that the interest of the carrier was intended to be insured by Morse & Co. when they applied for the insurance and procured the certificate. If, as was thought to be the fact by the district judge, the premium was paid for the insurance by the claimant, that circumstance would be quite controlling to indicate an understanding between Morse and himself that his interest should be protected by the insurance. The evidence is that he agreed, through Morse & Co., with the agent of Armour, Plankinton

& Co., to pay the premium as a part of the consideration of the contract for transportation. In other words, he agreed for \$395 to transport the cargo to New York, and pay the premium for insurance. He paid it out of the \$395 received from Morse and Co., and in no other way. The owners paid the premium when Morse & Co. were paid by them.

Considerable evidence was elicited from the witnesses for the purpose of showing usage among shippers, insurers, and boatmen, at Buffalo, to the effect that insurance procured under circumstances similar to those in this case is understood to protect the carrier as well as all other persons interested in the safe transportation of the cargo. The evidence falls short of establishing such a usage. It is loose, conflicting, conjectural, and equivocal. See *Donnell v. Columbian Ins. Co.*, 2 Sum. 366; *The Eddy*, 5 Wall. 481; *Bolton v. Colder*, 1 Watts, 360; *U. S. v. Buchanan*, 8 How. 83, 102. So far as this evidence tends to show that Morse & Co., when they procured the insurance, intended to obtain it for the benefit of the carrier as well as for the owners and themselves, it is legitimate; but it is not persuasive in view of the fact that the insurance was procured at the request of the owners, and as a condition of the contract for transportation, and the further fact that there was no conversation between Morse & Co. and the master of the Worden.

Those considerations lead to a reversal of the decree of the district court. The apostles indicate that the question whether the claimant was guilty of negligence in the navigation of the boats has not been fully litigated, and that the claimant has mistakenly relied upon the theory that the facts proved did not make out a *prima facie* case against him. It is therefore deemed proper to permit the claimant to apply for leave to introduce further evidence upon the question whether the loss arose from the want of ordinary care and skill in the navigation of the boats. Unless such an application is made within 20 days a decree will be entered for the libelants in the sum of \$6,175.89, with interest from May 28, 1883, with costs in this court and in the district court.

THE CLARION.

(*District Court, E. D. Michigan. January 23, 1886.*)

1. COLLISION—NEGLIGENT NAVIGATION—STEAMER STARBOARDING AND ATTEMPTING TO CROSS BOWS OF ANOTHER STEAMER.

A steamer which starboards, and attempts to cross the bows of another steamer which has the right of way, does so at her peril, and will be held answerable for the consequences.

2. SAME—MUTUAL FAULT—DIVISION OF DAMAGES.

Where one vessel is clearly shown to have been in fault, there should also be clear evidence of a contributing fault on the part of the other vessel to justify a division of damages.

This was a libel for a collision between the railway transfer steamer Lansdowne and the propeller Clarion, which occurred early in the morning of July 15, 1885, in the Detroit river, opposite the premises of the Michigan Central Railroad Company, in the city of Detroit. The libel averred that the Lansdowne left her slip on the American side of the river about half-past 1 in the morning, laden with a train of passenger cars, and took her course diagonally across the river for her slip upon the Canada side, nearly two miles above her point of departure. When about the middle of the river, and somewhat on the Canadian side, and a little below the Canada Southern Railway slip, she made the Clarion coming down the river exhibiting her white and red lights. The Lansdowne blew one blast of her whistle, and ported. The Clarion did not reply at once, but kept on showing her red light until within a short distance of the Lansdowne, when she blew two blasts of her whistle, and suddenly changed her course, exhibiting her green light, heading apparently for the bow of the Lansdowne. It was then too late for the Lansdowne to change her course, but she immediately blew another signal whistle, and reversed her engines. The Clarion came on, however, showing both colored lights, and struck the Lansdowne upon her port wheel-house, doing damage to a large amount. The case of the Clarion was that after passing Belle isle, above the city on the Canada side, she ported, and drew over to the American side of the river, within five or six hundred feet of the docks along the front of the city, for the purpose of calling the attention of her Detroit agents to the fact that she was passing the city, as was the usual custom with that line of boats; that having given her signal of four long and four short whistles opposite the office of the company, she starboarded for the purpose of clearing the "middle ground" opposite the Michigan Central Railroad freight-house and resuming her course down the river on the Canadian side; that about this time she heard a single whistle from the Lansdowne, which was coming up the river on her starboard bow, showing both her colored lights, the Clarion then showing her white and green lights to the Lansdowne; that deeming it impossible to port and pass the Lansdowne on the port side on account of the proximity of the middle

ground, the Clarion immediately replied with two blasts, when the Lansdowne again sounded a single blast, and the Clarion thereupon at once stopped and backed; that up to the time the Lansdowne sounded her second signal she was approaching on the starboard bow of the Clarion, but soon thereafter she ported, and shot across the bows of the Clarion, and so brought about the collision.

The court was assisted upon the argument by Commander Cook, of the navy, and Capt. Warner, of the revenue marine, sitting as nautical assessors.

H. A. Harmon and H. H. Swan, for libellant.

Moore & Canfield, for claimant.

BROWN, J. We have found but little difficulty in reaching a conclusion in this case. Indeed, there is no such dispute with regard to the facts as would affect materially the result. We think the Lansdowne left her slip about the time the Clarion passed the dock of Mr. Chesebrough, the agent of the line, and that her failure to hear the eight signals of the Clarion was owing to the fact that the attention of her master and crew was diverted, or rather was not fixed upon the approaching vessel, until she had left the slip, and that very soon after that she sounded her signal of one whistle.

So far as the locality of the collision is concerned, I am advised by the nautical assessors that in their opinion it took place between the Michigan Central Railway elevator A and the Canada Southern slip, on the opposite side of the river, and at a point somewhat upon the American side, with room, however, quite sufficient for the Clarion to have passed down between the Lansdowne and the middle ground, which lies immediately off the freight depot of the Michigan Central Railroad. I am quite satisfied with their conclusion upon this point.

There is one fact developed by the testimony which we regard as the pivotal fact in the case, and one of much more importance than the mere question of locality; and that is that at the time the Lansdowne blew her first whistle she was showing both her colored lights to the Clarion, and we also think that the Clarion was probably showing both her colored lights to the Lansdowne, although it is claimed by the Clarion that the Lansdowne was then upon her starboard bow, in which case the Clarion would only exhibit her green light. The two steamers then were approaching either end on, or nearly end on, within the eighteenth rule, or were upon crossing courses within the nineteenth rule, the Clarion having the Lansdowne upon her starboard side. In either case, it was the duty of the Clarion to port, or at least to keep out of the way. So, too, upon either theory, the Lansdowne was perfectly justified in blowing a single whistle and porting. Assuming that she was keeping somewhat on the American side, we do not find that there is any rule or custom that would forbid her taking that course, provided she left sufficient room to permit the Clarion to pass down upon the port side. Even if we were to

confine ourselves to the testimony of Capt. Harriman, and find the collision took place on the American side of the river, we do not feel bound to condemn the Lansdowne.

Upon receiving the single whistle of the Lansdowne, it was the clear duty of the Clarion to answer at once with one blast of her whistle, and to keep down on the American side of the channel. The Lansdowne was bound to give her room enough for her to pass down between her and the middle ground, and the Clarion was bound to presume that she would do so. Even if the master of the Clarion was afraid he would be crowded too far over upon the American side, he should not have starboarded, but should have stopped, or possibly stopped and reversed. At any rate he should have stopped, and the very worst that would have happened to him would have been to drift ashore on the middle ground, from which he could have been gotten off with little or no loss. In any view of the case, it was a gross fault upon the part of the Clarion to blow two blasts of the whistle and starboard her wheel. In so doing she acted at her peril, and must be held answerable for the consequences. Bearing in mind that the two steamers were approaching each other at a combined speed of 20 miles an hour, and that they must have been less than a mile apart at the time the Lansdowne blew her first signal, the chances of the Clarion crossing the bows of the Lansdowne before the latter reached the intersection of the two courses were very slight. I know of no case in which a vessel has been justified in disregarding a proper signal from an approaching vessel, and proposing a departure from the rule of the road, after such approaching vessel had signified her desire to adhere to it.

In the case of *The Milwaukee*, Brown, Adm. 313, 321, it was held by this court that the burden is upon a vessel claiming a departure from the statutory requirement to prove "(1) that a proposition to depart from the statute was made by her by means of signals prescribed by rule of the supervising inspectors, and in due season for the other vessel to receive the proposition, and act upon it with safety; (2) that the other vessel heard and understood the proposition thus made; (3) that the other vessel accepted the proposition." "These facts," says Judge LONGYEAR, "must be made out by clear and satisfactory proofs. They must not be left to inference. The statute in question is one of vital importance for the protection of life and property upon the waters, and it will not do to hold a party blameless for a departure from its plain provisions upon a plea of an agreement or license to do so, except where such agreement or license is admitted, or is made out beyond all reasonable doubt by clear and satisfactory proof. Where the agreement is denied, and the evidence is conflicting and contradictory, and does not clearly preponderate in favor of such agreement, the statute must govern, and the responsibility of parties must be determined accordingly." I regard this as a sound enunciation of the law upon the subject. In this

case the proposition to depart from the statute is the more excusable from the fact that the Lansdowne had already signified her intention to adhere to it.

We do not wish to be understood as extenuating in any degree the obvious fault of the Lansdowne in sailing without a lookout. We have no doubt that, having regard to the number of vessels in the Detroit river, to the valuable lives that the Lansdowne had on board, to her great size and speed, and the tremendous energy with which she moved, that it was grossly careless for her to navigate without a lookout, and we should promptly condemn her in this case did we find that this contributed to the collision; but we think that in her management, in the course she took, in the signals she gave to her wheel, to her engineer, and to the approaching vessel, she was guilty of no fault. She appears, too, to have sighted the Clarion as soon as she left her slip. In this connection I call attention to the language of Judge WOODRUFF in the case of *The Comet*, 9 Blatchf. 329, in which he says that where one vessel has been guilty of a clear fault, there should also be clear evidence of a contributing fault on the part of the other vessel in order to divide the damages. "It should not be enough that they make the care and skill and good management of the other vessel doubtful." We are unable to put our finger upon any fault committed by the Lansdowne, aside from the technical one of being insufficiently manned.

There must be a decree for the libellant, and a reference to a commissioner to assess the damages.

BORLAND v. ZITTLOSEN and others.¹

(District Court, S. D. New York. March 30, 1886.)

1. SHIPS AND SHIPPING—SUPPLIES—PAYMENT—PART OWNER'S NOTE—DISCHARGE OF OTHER OWNERS.

Supplies were furnished to a vessel by one B., who received on account of it the four-months note of Z., the ship's husband and a part owner. Z. subsequently became insolvent. The note was protested, and this action was brought by B. against all the owners for the value of the supplies. It appeared that B., in so taking the note, did the best he could to obtain payment. *Held*, that such taking of Z.'s note by B. was not a discharge of the other part owners.

2. SAME—EQUITABLE ESTOPPEL—EVIDENCE—ADMISSIONS, UNSATISFACTORY NATURE OF.

The master of the vessel, previous to remitting several sums of money to Z., had caused inquiries to be made of B. as to whether his bill for supplies had been paid. After B.'s death several witnesses testified that B. had admitted that it had been paid or settled by Z., and the captain made several remittances to Z., as managing owner. Z. was, however, a creditor of the ship and of the other owners on joint account, to a much larger amount than the amount of the remittances thus sent him. It was contended that this admis-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

sion by B. created an equitable estoppel, which discharged the respondents. *Held*, on the evidence, (1) that the alleged statements of B. were improbable, and not satisfactorily proved; and, (2) if made, were not shown to have been made with any intent to induce payment to Z. by the master, or with any knowledge that they were likely to do so; and (3) that it was not shown that respondents were pecuniarily prejudiced by the misrepresentations so that it would be unjust to allow libellant's claim. *Held*, therefore, that an estoppel had not been made out, and that libellant should recover.

8. SAME—NOMINAL OWNER—PERSONAL LIABILITY FOR SUPPLIES—MASTER OR MANAGING OWNER'S AUTHORITY TO BIND.

"The law is well settled in this country that a mere registered owner, holding a nominal title only for the benefit of another, and taking no part or interest in the vessel's business, is not personally liable for supplies furnished. In such cases, though the vessel may be bound *in rem*, the master or managing owner has no authority to bind the merely nominal owner personally."

In Admiralty.

Wilcox, Adams & Macklin, for libellant.

Goodrich, Deady & Platt, for respondents.

BROWN, J. This libel was filed to recover a bill of \$1,441.77 for supplies furnished by the libellant to the ship *Zephyr* in June, 1883. The proof shows that the registered owners were the defendants Zittlosen, Springler, and Booth; but that Booth was a mere nominal owner, holding his interest for the benefit of the defendant Kruger, a prior registered owner, in whose interest the voyages continued to be made as before; that Zittlosen was ship's husband and general agent of the vessel in New York; and that Booth took no part and had no beneficial interest in her navigation. The amount of the supplies was admitted.

The law is well settled in this country that a mere registered owner, holding a nominal title only for the benefit of another, and taking no part or interest in the vessel's business, is not personally liable for supplies furnished. In such cases, though the vessel may be bound *in rem*, the master or ship's agent has no authority to bind the merely nominal owner personally. *Macy v. Wheeler*, 30 N. Y. 231, 241; *Stedman v. Feidler*, 20 N. Y. 437; *Scull v. Raymond*, 18 Fed. Rep. 547, 549, 550, and cases there cited. If, in any such case, an equitable estoppel might arise against a registered owner through the effect of the registry and the representations of the captain or agent, the estoppel could not arise where the material-man was put upon his guard, or had reason to suppose that the registered owner was a merely nominal owner for the benefit of another. In this case I think the evidence is sufficient to show that the libellant knew that Booth, though one of the registered owners, had no interest in the vessel. In *Brodie v. Howard*, 17 C. B. 109, 121, and *Fraye v. Cuthbertson*, 6 Q. B. Div. 93, knowledge that a part owner dissented was held immaterial. It was held a sufficient defense that the other owners and the master had no authority to bind him. Upon either ground the defendant Booth must be held not liable in this case.

In September, 1883, the libellant took the note of Zittlosen, the ship's husband, at four months, for the amount of the bill. Before

it matured Zittlosen became insolvent, and the note was protested, and has never been paid. The libellant died, and the case was continued by his administratrix. It is contended that the other defendants are discharged, on the ground of equitable estoppel, because the master, before remitting to Zittlosen, the ship's husband, several sums of money in August, 1883, amounting altogether to about \$7,500, caused inquiries to be made of Borland, through Kruger, whether his bill for supplies had been paid; and that Borland, in answer to these inquiries, stated that it had been paid or settled by Zittlosen; and that in consequence of this statement the remittances were sent by the master to Zittlosen; and that but for such assurances the master would have paid the libellant's bill through some other channel, as some question already existed as to Zittlosen's credit. If a material-man voluntarily takes a note or bill from the ship's husband, or one of the part owners, knowing that he might have the money from the other owners jointly liable, and the situation of the latter is afterwards altered for the worse through their dealings with the agent, no doubt the owners are discharged. *Macl. Shipp.* (3d Ed.) 113, 186; *Strong v. Hart*, 6 Barn. & C. 160. But in this case the evidence does not suggest any intimation to Borland that he might have procured the money from any other person than Zittlosen. He was the only authorized channel of payment. So far as appears, Borland, in taking Zittlosen's note, did the best he could to obtain payment. The master was away; Booth, I think, was known not to be really interested in the matter; and Kruger was known not to be the person from whom payment was expected, or in any condition to pay. Taking the note of Zittlosen was, therefore, not in itself any discharge of the other defendants. *In re The Salem's Cargo*, 1 Spr. 392; *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122; *Muldon v. Whitlock*, 1 Cow. 290; *Davison v. Donaldson*, 9 Q. B. Div. 623.

The estoppel relied on is based upon the alleged statements or admissions of Borland, which three witnesses testified were made by him to Kruger in July, 1883, to the effect that he had been paid, or had been settled with, by Zittlosen. If the proofs satisfied me that statements of this kind had been deliberately made by Borland, and made either with the design to influence the remittance of funds to Zittlosen, or under circumstances that Borland might reasonably have supposed would influence the conduct of the other owners, and that the other owners, relying upon these statements, had afterwards remitted funds to Zittlosen to their prejudice, no doubt a legal estoppel would be made out against any subsequent claim upon the other owners; for the remittance and the consequent injury would in that case have been chargeable to the wrongful misrepresentation of the creditor. *Thomson v. Davenport*, 9 Barn. & C. 78; *Robinson v. Read*, Id. 449; *Irvine v. Watson*, 5 Q. B. Div. 414; *Davison v. Donaldson*, 9 Q. B. Div. 623; *Heald v. Kenworthy*, 10 Exch. 739, 746; *Berwind v. Schultz*, 25 Fed. Rep. 912, 920; *The Irthington*, *post*, 143.

Conceding that something of the purport alleged was communicated by Kruger to the captain, although that fact was not strictly or properly proved, and conceding that about \$7,500 was afterwards remitted by the captain to Zittlosen, in order to constitute an equitable estoppel, or an estoppel *in pais*, the proofs must show: (1) Reasonable certainty as to the misrepresentations alleged; (2) an intent that the statements should be acted on, or knowledge that the representation was one likely to be acted upon, or that it was of a nature and under circumstances calculated to mislead the other party to his prejudice; (3) and that the other party was thereby induced to act upon it, and did act upon it, to his prejudice. Bigelow, Estop. (3d Ed.) 484, 490, 541, 549. I am not satisfied that the facts and circumstances proved are sufficient to constitute such an estoppel in this case, for the following reasons:

1. Certainty as to the facts is the first requisite of such an estoppel. Bigelow, Estop. 490; *The Belle of the Sea*, 20 Wall. 421, 430. Testimony as to naked admissions given by witnesses who, though not parties to the record, are in close sympathy and interest with the party calling them, is one of the most untrustworthy kinds of evidence. 1 Greenl. Ev. § 200. In *Lench v. Lench*, 10 Ves. 518, Sir WILLIAM GRANT says: "This is, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration." This was approved by the chancellor in *Botsford v. Burr*, 2 Johns. Ch. 412, and by STORY, J., in *Smith v. Burnham*, 3 Sum. 438. Under our present practice, which allows parties to be witnesses, where such testimony is given after the death of the person alleged to have made the statements, so that only one side can be heard, it is liable to peculiar suspicion. Usually the witnesses cannot give the precise language, nor the whole of it. A little difference of expression, or a slight qualification omitted, forgotten, or suppressed, might neutralize all its legal effect. In the cases above referred to, the absence of corroborative circumstances, with some countervailing proofs, were held sufficient ground for disregarding it, leading to the conclusion, as STORY, J., observes, that "there may have been some mistakes and misapprehensions, to say the least, on the part of the witnesses as to the purport and effect of the conversation to which they testified." When there are no corroborative circumstances, and the proofs show beyond controversy the incorrectness of the statements alleged, and that there was no motive to mistake the fact, it is more rational to suppose misunderstanding or mistake or inaccuracy in the testimony, than to suppose statements made which the circumstances show to be in the highest degree improbable, if not incredible.

Such is precisely the situation of the libellant's claim here. At the time the statements are alleged to have been made by Borland, that is, in July, 1883, it is perfectly certain that not a dollar had been

paid upon his claim, and that no settlement had been made in reference to it; although it is probable from other testimony that some efforts had been made to obtain it. The note was not taken until in September. No motive is suggested that Borland could have had to state untruly that his claim was either paid or settled. Had it been intimated to him that the captain would send him the money for his bill, there is no possible doubt that he would have accepted the proposition at once. No such intimation was given him.

2. Whatever the conversation may have been, it is not stated that there was any suggestion to Borland that the inquiry was made in the master's behalf, or intended to be communicated to the master, or made with reference to securing the payment of the libellant's bill; or that any remittances of money to Zittlosen were intended. Kruger, to whom the statements are said to have been made, was at the time largely indebted to the ship, and no payment or settlement was expected by Borland through him. So far as related, the conversation, even as testified to, would seem merely casual. Estoppels of this character are based upon the obligations of good faith. This obligation is mutual, and requires that no estoppel be drawn from conversations merely, unless the person answering inquiries knows, or has reason from the circumstances to believe, that the action of others is likely to be influenced by his answers. *Pierce v. Andrews*, 6 Cush. 4; *Bigelow*, *Estop.* 484, 529, 541. There was nothing to indicate anything of this kind to Borland. Whatever the conversations referred to may have been, I am not satisfied that the testimony as to Borland's remarks fairly represents all that occurred. The remarks may have been misunderstood, or imperfectly reported, or not seriously meant. He could not have supposed or suspected that they would influence any one's conduct. They may have been mere *facetiae* or *persiflage*, or made after the note had been taken in September,—too late to operate as an estoppel.

3. To constitute an estoppel it must further appear that the defendants have been legally prejudiced; that is, so substantially injured that it would be *unjust* to allow the libellant's demand. The evidence fails to show this. The proof shows that both the other owners were indebted to the ship, and to Zittlosen, as ship's husband, far beyond all the moneys remitted by the captain, after the alleged statements of Borland. If the captain had paid Borland's bill, so much less would have been remitted to Zittlosen, and the liability of the master and of Kruger to him have been so much more. It is not claimed, and there is no reason to suppose, that the master would not have sent to Zittlosen the remaining \$6,000. As a creditor of the ship he was entitled to that money. It was a matter of indifference to these defendants whether their indebtedness was to Zittlosen alone, or to Borland and Zittlosen. They have lost nothing by paying the whole \$7,500 to Zittlosen, instead of paying some \$1,500 of it to Borland. The fact that so large an amount of money, in excess of Bor-

land's bill, was sent to Zittlosen, renders it improbable that the conduct of the defendants in sending the money to Zittlosen was at all induced by Borland's statements; or that the master's inquiry by letter to Kruger was anything more than a mere voluntary friendly act for Borland's security. Even this possible view is somewhat doubtful, from the fact that the alleged intention to pay Borland directly, rather than through Zittlosen, if he was not already paid, was in no way communicated to Borland at the time, as it naturally would have been if really intended; and that alleged intent even now rests solely upon these long subsequent statements of mere secret, uncommunicated intentions at that time. Upon my strong doubts of the correctness of the testimony as to the statements alleged to have been made by Borland, the absence of any corroborative circumstances, and of any offer to pay him at the time, and upon the evidence showing that there has been no substantial legal prejudice as respects the liabilities of the defendants, on the whole, I must hold the estoppel not made out. *Macl. Shipp.* 114, 186; *The Active*, *Olc.* 286; *Robinson v. Read*, 9 *Barn. & C.* 449; *Muldon v. Whitlock*, 1 *Cow.* 290; *Berwind v. Schultz*, 25 *Fed. Rep.* 912, 920; *Keay v. Fenwick*, 1 *C. P. Div.* 745, 754.

The libelant is entitled to a decree against all the defendants, with costs, except as against Booth, against whom the libel is dismissed, with costs.

THE EDWIN I. MORRISON.¹

BRADLEY FERTILIZER CO. v. THE EDWIN I. MORRISON.

(*District Court, S. D. New York.* March 30, 1886.)

CARRIER OF GOODS BY VESSEL—UNSEAWORTHINESS—PERILS OF THE SEA—DAMAGE TO CARGO—PUMP-HOLE—TAKING IN WATER—INSECURE FASTENINGS—NEGLIGENCE.

The schooner *M.*, while on a voyage down the coast, deeply loaded, in the winter season, was discovered to be making water rapidly. When the crew were about to take to the boats, it was discovered that the water was being taken in through one of the bilge pump holes, the cap of which had come off. The proof showed articles washed about the deck. On the hole being covered, the vessel was pumped free, but the cargo had been damaged by the water taken aboard, and this suit was brought for such damage. The vessel had been in constant use for some 11 years, in all weathers. There had never before been any accident from these pump-holes. It appeared that the cap of the pump-hole had never been unscrewed, or its fastenings tested, for several years at the least. *Held*, that the cap was carried away on account of the weakness of its fastenings, and not from any extraordinary contingency; and that while there was no reason to charge the vessel with any defect in her original construction with such pump-holes, she was bound, before starting at this season, so deeply loaded, to have seen to it that the plates and caps were secure against ordinary accidents, and she was liable for damage to her cargo caused by her neglect to do so.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Scudder & Carter, for libelants.

Wilcox, Adams & Macklin, for claimant.

Brown, J. The libel in this case was filed against the schooner Edwin I. Morrison to recover for the damage done to a cargo of guano by sea-water taken aboard on the tenth day of January, 1884, on her voyage from Boston to Savannah. The schooner sailed on the fifth of January, and, according to her log, on the afternoon of the ninth of January met a very strong gale and heavy sea, and shipped great quantities of water. The 10th opened with a strong westerly gale, sea running very high. "At 8 A. M.," as the log continues, "set two reef foresail and *storm trysail, and hove vessel to, heading about south.* Found that the vessel is making water faster than we can pump her out with both pumps, *the men not being able to work at pumping steadily because of heavy seas sweeping her decks.* Sounded pumps, and found that she has *seven feet* of water in the hold. Cut the boat lashings, and got all ready to leave vessel, when found that the cap had washed off the bilge pump hole on the port side. Nailed a piece of sheet lead over it, and started both pumps agoing. Pumped two hours, and sounded again, and found that we are freeing her very rapidly." The words above quoted in italics have been added to the log at some time since the original entry. The figure "7" is written over an erasure. The damage sued for was occasioned by the flooding of the hold.

The evidence leaves no doubt that most of the water was taken in through the bilge pump hole referred to in the above extract from the log. This was a hole on the port side, in the water-ways, a short distance only in front of the poop, and ran down through the water-way between the ceiling and the skin of the ship. There was a similar hole on the starboard side. They were placed there in the construction of the ship for the purpose of running a hose down in the bilges so as to pump out the water more thoroughly in case of a light cargo and much rolling. The hole was from three to four inches in diameter, and was covered by a brass plate about four inches square, countersunk into the timber, through which was a hole covered by a brass cap which screwed into the plate. The plate was fastened into the water-ways by screws. Such bilge pump holes are not unusual in vessels constructed in some localities, and seldom have any accidents arisen from them. The mode of covering them above described was deemed perfectly secure. Such caps usually project a little above the surface of the water-way, the upper edge of the cap being beveled off so as to leave usually not more than an eighth of an inch of perpendicular surface. The only question in this case is whether, considering all the circumstances, any negligence is shown either in the handling of the ship, or in the sufficiency of her equipment as a seaworthy vessel, as respects the proper security of this port cap and plate.

The schooner was built some 11 years previous. These holes had never been used. They were dangerous unless the caps and plates to cover them were kept perfectly tight and secure. The obligation to keep watch of their condition was as stringent as the danger from weakness in them was extreme; yet there is no satisfactory evidence that there had been more than a casual examination of them since the schooner was built. The evidence shows that up to about half past 4 A. M. of the 10th the schooner had made no more water than was speedily pumped out in the ordinary handling of the pumps every two hours. Upon renewing the pumping at half past 4, and not obtaining a suck as soon as usual, the captain, at 5 A. M., sounded and found 18 inches of water in the hold. The schooner at that time, according to the captain's testimony, was on the port tack, lying to. In order to man the pumps better she was then put before the wind, with the wind on the starboard quarter, which gave her a list to port of about two streaks. Notwithstanding the constant pumping, she continued settling till 9 o'clock, when seven feet of water was found in the hold. The captain supposed she had sprung a leak, probably through her bow ports. About 11 o'clock they wore ship, which presently brought her port side out of water; when, through the gurgling in the bilge pump hole, the second mate discovered the opening, as the master and crew were on the point of abandoning her. The opening was soon covered with sheet lead, and shortly after the ship was speedily lightened by the use of the pumps. The second mate, who took charge of the watch at half past 4, says that she was then on the starboard tack; but he also says her booms were on the starboard side, and that the port side was lowest in the water, and that it was 8 o'clock when they kept her off on the same tack.

The theory of the defense is that the plate and cap were perfectly tight; but that, through the many seas taken aboard and the washing about of many articles upon the deck, particularly of the heavy covers of the chain lockers that had got adrift, the bilge plate and cover, though perfectly sound and tight in their setting, were knocked off by violence or some accidental blow of the floating articles. For the libelants it is urged that this explanation is purely hypothetical, and not entitled to be accepted as a discharge of the ship's presumptive liability.

1. I do not find any reason to charge the ship with any defect in her original construction by reason of having the bilge pump holes. The fact that they were quite commonly used in the construction of such vessels, and deemed safe; that this schooner had been in constant use during all weathers for some 11 years without any previous accident from them; that the existence of these holes was obvious upon any careful inspection or survey of the schooner; and that no objection has ever been made to them,—are a sufficient answer to any charge of unseaworthiness from the mere fact of having such holes. It is, doubtless, possible that if one of the heavy chain locker

covers had been swept violently across the deck in an exactly level position, and with a sharp and hard edge had hit the upright surface of the cap, that might have torn off the cap and plate, and account for this accident. The probabilities of any such contact of a sharp and solid edge of one of these covers in the exact position to do this are exceedingly small. The cap and plate were upon the water-ways, and a number of inches above the deck. The second mate says the covers were "water-logged." They would hardly seem capable of inflicting any blow that would not slide off and over the beveled edge of the cap, if the cap and plate were securely fastened. It seems incredible, moreover, that any such blow could have been given that would not have left its marks upon the stanchions and bulwarks on the port side, which were within a few inches of the plate; yet no such marks appear, nor was anything broken or carried away in that vicinity except the cap and plate, although on the starboard side the bulwarks were in some places carried away. There is, in fact, no evidence of any such violent blow in the region of the cap and plate as is assumed by the claimant. Several experts, moreover, express the opinion that if the plate had been carried away by such a blow, the wood, if sound, would have retained the screws, and their heads would have been broken off, although other experts express a contrary opinion. The screws, however, were carried away with the plate. For the claimants one witness testified that the holes of the screws were sound, and not decayed or blackened; and the fact that the wood held the sheet lead afterwards nailed upon it is urged as evidence that the wood was sound. Other witnesses also testify to the fact that it was sound.

The question is entirely one of probability as to the cause of the plates' coming off. If there was evidence that the plate had been knocked off by some violent blow from objects washed by the seas across the deck, it would still be incumbent upon the claimants to satisfy the court that the cap and plate were so made and so fastened as not to be liable to be knocked off by any ordinary collisions of that kind. The claimant did not introduce any proof by exact measurements to show what was the height of the cap above the water-ways, or the height of the perpendicular edge up to the beveling, nor was the duplicate cap on the starboard side produced. Only some models and samples of what is usual were exhibited. From the evidence, it must be inferred that for several years past, at least, if not ever since the schooner was finished, the cap had not been unscrewed, nor the fastenings of the plate tested.

The schooner on this voyage was also loaded deep, as the evidence clearly shows. The second mate so states explicitly. She may not have been loaded so deep as to be unseaworthy in this respect, but she was loaded deeper than is usual or prudent for the winter season. She was a stanch vessel, and her behavior and recovery, notwithstanding she was on the verge of sinking, are good evidence as to her

generally stanch character and good handling. But being deeply loaded, and sailing down the coast in the winter season, it was to be expected that she would encounter storms, and that her decks would all the more from her deep loading be swept by heavy seas. Before starting out thus deeply loaded she was bound to have seen that the plates and caps in her water-ways were all fast and secure against ordinary accidents or collisions that might come from loose objects swept by the seas across her decks.

The testimony on behalf of the vessel, at the trial, I must deem somewhat exaggerated, both as to the severity of the gales she met, and as to the amount of water on deck prior to the time when the leak became serious. After the leak increased rapidly she necessarily settled gradually lower in the water, and consequently was much more swept by the seas. It is noticeable that although the log says that the vessel on the 9th was laboring heavily, and shipped great quantities of water, this is not stated to have been the case on the 10th until after 8 A. M., several hours after this heavy leak began, although it is said the sea was running very high. The captain's statement, moreover, that the vessel was on the port tack through the night would not make very probable a list to port before the cap was knocked off, and before the water got into the hold. His testimony in the various places where this subject is spoken of leaves it doubtful whether she had any list to port before she was headed off to run free, after 18 inches of water had been discovered at 5 o'clock; and the cap must have got off before that time. The second mate testifies that all the places where the bulwarks were carried away were "on the starboard side; that is, the weather side." He says that about 5 o'clock he picked up one of the chain locker covers close to the poop, where it had been washed, within about two feet of the port cap; but as this was, as he said, a little after daylight, it must have been nearer 6 o'clock than 5. This cover he says was of wood, and water-logged. If so, its edges would scarcely be sufficiently hard to knock off a plate properly secured, having only from one to two eighths of an inch of perpendicular surface.

There can scarcely be any doubt that the cap and plate were carried off through the action of the sea and the things washed about the deck; but the evidence indicates pretty clearly that this was done before the vessel was subjected to any extraordinary conditions, aside from her deep loading; and it is certain that there was no indication of any special violence about the wood-work in that quarter, such as would be necessary to knock away such a cap if properly secured. I think that the only reasonable conclusion is that, after 11 years' service, the fastenings had become weak, and that the plate was carried away from that cause, and not from any extraordinary contingencies. The fact that the starboard plate was still secure does not prove that the port plate might not have become loose or weak. There had been no careful inspection for a long time to make sure of its safety and

strength. Its insufficiency, though latent, was legally at the risk of the vessel. *Work v. Leathers*, 97 U. S. 379; *Wilson v. Griswold*, 9 Blatchf. 267; *Hubert v. Recknagel*, 13 Fed. Rep. 912; *The Lillie Hamilton*, 18 Fed. Rep. 327.

In the case of *The Titania*, 19 Fed. Rep. 101, there was no long lapse of time during which the original fastenings might naturally have become weak. The fastening and the careful inspection were recent. Here the contrary is the fact.

To be ascribed to a peril of the seas, the burden of proof is upon the vessel to show that the plate and cap were probably carried away by extraordinary contingencies not reasonably to be anticipated. The evidence does not, in my judgment, disclose any such extraordinary condition of things at the early hour of 4:30 to 5 A. M. of the 10th, considering the time of the year and the depth of loading under which the vessel set sail. It does not appear that she lost a spar or a bit of canvass, although there was doubtless a long continuation of heavy weather. The improbability that any of the supposed causes should have carried away the plate, if it had been properly secured at the time of sailing, without doing any other damage to the bulwarks or stanchions adjacent, I deem so great that I feel constrained to ascribe the cause, in the absence of proof of any thorough trial or inspection of the plate before the schooner sailed, to the gradual weakening of the fastenings during the 11 years since the vessel was built.

Fully appreciating the uncertainty and embarrassment that attend the case, I must allow judgment for the libellant, and direct an order for reference to compute the damages.

THE DENMARK.¹

FRITZSCHE v. THE DENMARK and others.

(District Court, S. D. New York. April 5, 1886.)

CARRIER OF GOODS BY VESSEL — BILL OF LADING — VALUABLE CARGO — VALUE CONCEALED — LOSS — LIABILITY.

A quantity of highly valuable musk was shipped on the steamship D., under a bill of lading which read: "Not accountable for * * * highly valuable goods, or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor, and the value therein expressed, and freight paid accordingly." The value of the musk was not disclosed by the shipper, nor was extra freight paid. It was usual to pay a much larger freight on musk. The musk was shipped with another case of small value, and like it in external appearance. On the voyage the box was rifled, and the musk partly lost. There was no evidence of intentional wrong, or want of ordinary care on the part of the ship. *Held*, that the shipment was presumptively in bad faith, and that the stipulation of the bill of lading protected the carrier, and that the libel should be dismissed.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Samuel V. Speyer and F. A. Wilcox, for libelant.

John Chetwood, for claimants.

BROWN, J. In September, 1880, Fabre & Co., of London, as agents for the libelants, shipped a chest of tea, and two other cases, marked, respectively, F. B. 3, F. B. 2, and F. B. 4. F. B. 2 and F. B. 4 were boxes of similar size and form; F. B. 2, containing acid of benzoïn of the value of £15 16s. 8d., and F. B. 4 some glass bottles, and three small tins of Tonquin musk, of the value of £202 3s. The musk was in pods, and very valuable, worth £2 10s. per ounce. The bill of lading contained, among numerous other provisions, the following:

"Not accountable for weight, contents, value, length, measure, or quantities or condition of contents; nor for money, documents, gold, silver, bullion, specie, precious metals, jewelry, precious stones, or *other highly valuable goods*, or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor, and *the value therein expressed, and freight paid accordingly.*"

No value was mentioned in the bill of lading, or stated to the carriers on loading, or any extra freight paid for the highly valuable case of musk. On goods of such character, if known, the customary rate was 1 per cent. freight,—very much higher than was charged in this case. Valuable articles, whose value was stated and freight paid accordingly, were usually stored in the store-room of the ship, and a special receipt given for them. Goods of all sizes, not valuable, and simply requiring dry stowage, were put into hold No. 2 orlop,—the smallest hold of the ship. The goods in question, not being shipped as valuable, were stowed in No. 2 orlop. On the voyage to New York the box containing the musk was rifled, and its contents scattered, apparently by some person ignorant of its value. A portion of one of the cases was lost. One was subsequently recovered partly filled, and the other nearly or quite empty. This suit is brought for their value. The other two cases were delivered uninjured.

The libelant's agents must be assumed to have been acquainted with the fact that extra freight was by custom always payable on musk, as well as with the usages of this line of steamers, and with the bills of lading, and their stipulations, including the stipulation above quoted. These stipulations had been long in use; and it was the plain duty of the shipper to make known the extreme value of the musk package, and to pay freight accordingly, both from the custom and from the express stipulations. I cannot regard the shipment of these valuable articles as ordinary merchandise, along with other cases of small comparative value and of similar external appearance, without making known the great value of one of the cases, as other than presumptively a fraudulent concealment and imposition upon the carrier. The right of a carrier to protect himself against claims for extraordinary damage by stipulating for notice of articles

specially valuable, in order that special care may be given to them, and to require the payment of a proportionate compensation, is now too well settled to be questioned. *Muser v. American Exp. Co.*, 1 Fed. Rep. 382; *The Hadji*, 18 Fed. Rep. 459; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; S. C. 5 Sup. Ct. Rep. 151; *Magnin v. Dinsmore*, 70 N. Y. 410. No express inquiry by the carrier was necessary. The duty of disclosure was incumbent on the shipper. Good faith required it. *Warner v. Western Transp. Co.*, 5 Rob. 490; *Tate v. Hyslop*, 15 Q. B. Div. 368. By whom the box was broken open is wholly unknown. There is no evidence by whom it was done,—whether by a passenger or by one of the seamen. There is no evidence of any intentional wrong, or of want of ordinary care, on the part of the ship. The stipulation of the bill of lading must, therefore, be held a protection to the carrier, and the libel must be dismissed, but, under the circumstances, without costs.

‘THE IRTHINGTON.’

WRIGHT and others v. THE IRTHINGTON, etc.

(District Court, S. D. New York. March 30, 1886.)

SHIPPING—ADVANCES—ATTEMPT TO COLLECT THROUGH CHARTERERS—ESTOPPEL.

W. & Co., agents of the charterers, made advances for the benefit of the steamer I. and owners, which the owners were bound to pay, and afterwards endeavored to have them collected by their principals, the charterers of the vessel; which arrangement the latter at first agreed to, and accepted a draft which included the advances, but soon afterwards repudiated the arrangement. The owners adopted libelant's claim into their accounts as a credit to the charterers; but it did not appear that the latter ratified such act of the owners, or that any payment was made by the owners to the charterers on the faith of it which was not owed the charterers irrespective of libelants' claim; and the libelants' claim was never paid by the owners. *Held* that, as the situation of the owners had not been in any way changed to their prejudice through the libelant's original request to the charterers to collect the claim, there was nothing amounting to a legal estoppel against the libelants, and, their claim being a valid one, they were entitled to recover against the vessel.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

E. B. Convers, for claimants.

BROWN, J. The advances made by Wright & Co. were such as did not belong to their principals, the charterers, to pay, but were for the benefit of the ship and her owners. The evidence on the part of the claimants, fairly considered, does not show more than that Wright & Co. endeavored to have their principals, the charterers, collect the advances from the owners for the libelants' account. The libelants' evidence shows clearly that the advances were not made a charge against Schultz as debtor, but only placed in his account for the pur-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

pose of collection by him. The charge was against the ship and owners; and in the account rendered to their principal the nature of it was indicated; and though Schultz at first assented to their request to collect it for them, and accepted the draft which embraced these items along with others, he almost immediately afterwards notified the libelants that he could not undertake to collect it, and that they must themselves collect from the owners. After some controversy about the matter, the libelants credited Schultz with the amount that they had previously entered in his accounts.

As the facts would not warrant the court in holding that the advances were originally made on the credit of the charterers, the debt was a legal demand against the ship and her owners. The libelants are therefore entitled to recover, unless this legal demand has been in some way legally discharged. The efforts to collect it through Schultz seem to me to be satisfactorily explained, as above stated. Had Schultz actually collected the money from the owners, or had he made any binding settlement of his accounts with them in which this item had formed a part, so that the owners would be legally prejudiced by treating the claim as a subsisting demand against them, I should have held that to constitute an estoppel in the owners' favor against the libelants, although the latter might afterwards have failed to recover their money from Schultz, because this injury to the owners would have arisen through the creditors' own acts, and have made it unjust to disturb the settled accounts. *Robinson v. Read*, 9 Barn. & C. 449; *Thomson v. Davenport*, Id. 78; *Davison v. Donaldson*, 9 Q. B. Div. 623; *Keay v. Fenwick*, 1 C. P. Div. 745, 753, 756.

The evidence, however, shows the existence of a controversy at this time between Schultz and the owners. The owners adopted the libelants' claim into their accounts as a credit to Schultz; but it does not appear that Schultz ever adopted this act of the owners, or ratified it, or that any settlement between them was ever made upon that basis, or that any payment of money was made by the owners to Schultz that they did not owe him irrespective of the libelants' claim which the owners had put into their account. Schultz claimed, and still claims, so far as appears, a balance against them. The owners cannot make use against Schultz of the libelants' demand against them without payment of that demand. It has never been paid by them either to Schultz or to the libelant, and the situation of the owners has not been in any way changed to their prejudice through the libelants' original request to Schultz to collect the claim. In the case of *Berwind v. Schultz*, 25 Fed. Rep. 912, on the contrary, it was clear that the principal was prejudiced by the advance of money based upon the written receipt given by the creditor. The libelants' demand being, therefore, a valid demand against the ship, and never paid to the libelants, and there being nothing amounting to a legal estoppel against them, I must find that they are entitled to the sum claimed, with interest and costs.

HOE and others v. KAHLER.¹

(Circuit Court, S. D. New York. March 24, 1886.)

1. COURTS—UNITED STATES SUPREME COURT—APPEAL—RECORD—CLERK SUBJECT TO DIRECTION OF COURT.

The transcript of a record on appeal is understood to be transmitted to the supreme court from the circuit court, as such, under its seal, so that the clerk in making and certifying the transcript acts as an officer of, and under the general direction and control of, the lower court, in the first instance, subject to the further order of the supreme court on proceedings on suggestion of diminution of the record.

2. SAME—DIRECTION TO THE CLERK.

Where, in a doubtful case, the clerk is requested by one party to an appeal to insert in the transcript what he is requested by the other party to leave out, a direction by the court is proper.

3. SAME—WHAT THE RECORD SHOULD CONTAIN—RULE 8, SUPREME COURT.

Where an opinion had been rendered, on final hearing, sustaining a patent, and afterwards, on motion for a rehearing, a second opinion was filed denying the motion, and a final decree had been entered, referring to the proceedings upon the motion for rehearing as well as to the former proceedings, from which decree an appeal was prayed, *held*, that the opinion on the rehearing comes within the requirements of rule 8 of the supreme court, which requires a copy of the opinion or opinions filed in the case to be annexed to and transmitted with the record.

4. SAME—MOTION PAPERS.

Where the motion papers on rehearing, taken in connection with the record, illustrated the opinion rendered on such motion, and the disposition of the motion was referred to in the decree appealed from, *held*, that the whole was proper to be transcribed into the record, within the meaning of section 698, Rev. St., and rule 8, taken together.

In Equity.

W. H. L. Lee, for appellant.

James A. Hovey, for appellee.

WHEELER, J. This suit is for infringement of a patent. After an opinion on final hearing sustaining the patent a motion for rehearing was made and heard, and an opinion was filed denying the motion, and a final decree referring to the proceedings upon the motion as well as the former proceedings was entered. An appeal has been taken and allowed, and a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, are to be transmitted from this court to the supreme court, as required by section 698 of the Revised Statutes. Rule 8 of the supreme court requires a copy of the opinion or opinions filed in the case to be annexed to and transmitted with the record. The form of certificate used by the clerk reads that the transcript to which it is attached is a true and complete transcript. The appellant requests the clerk to leave the proceedings and opinion on the motion for a rehearing out of the transcript, and to certify that the rest is a true and complete

¹Edited by Charles C. Linthicum, Esq., of the Chicago bar.

transcript, which the clerk deems that he cannot in duty do. A motion is made that he be directed to do this, and has been heard. The transcript of the record is understood to be transmitted from this court, as such, under its seal, to the supreme court, so that the clerk in making and certifying the transcript acts as an officer of, and under the general direction and control of, this court, in the first instance, subject of course to the further order of the supreme court on proceedings on suggestion of diminution of the record. Therefore a direction of this court in a doubtful case, where the clerk is requested to insert in the transcript by one party what he is requested to leave out by the other, would seem to be proper. As argued by the appellant's counsel, the only question before the supreme court will be whether the decree appealed from was right when made, and the opinions or opinion to be annexed are such as bear upon that decree and expound the reasons for making it. The motion in this case was founded largely upon the record as it stood at the time of the first opinion, and went much upon the ground that later decisions of the supreme court would lead to a different conclusion. The second opinion reviewed the case in view of these decisions. The decree was entered in accordance with its reasoning as well as with that of the first opinion. *Hoe v. Kahler*, 25 Fed. Rep. 271. This opinion, therefore, comes within the requirements of the rule of the supreme court. The motion papers, in connection with the record, illustrate the opinion, and the disposition of the motion being referred to in the decree, the whole would seem to be proper parts of the record to be transcribed, within the meaning of the statute and rule taken together. Motion denied.

FARMERS' LOAN & TRUST Co., Trustee, v. CHICAGO & A. Ry. Co. and others.¹

(Circuit Court, D. Indiana. April 8, 1886.)

1. TRUST—DEATH OF TRUSTEE DOES NOT INVALIDATE TRUST.

A trust, valid at its inception, is never permitted to fail for lack of a trustee; *e. g.*, a conveyance in trust to two, one capable of taking and one not, will not become invalid by reason of the death of the competent trustee.

2. SAME—CITIZEN OF NATION HAS RIGHT TO HOLD PROPERTY UPON TRUST IN ANY STATE.

A citizen of the United States has the right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust for the benefit of himself and others, in any state of the Union. So held *arguendo*.

3. SAME—STATE STATUTE CONFINING TRUSTEES TO RESIDENTS, VOID AS TO CITIZENS OF THE UNITED STATES.

A state statute which declares a conveyance in trust of real or personal property to a non-resident, except by will, invalid, is void as to citizens of the United States, as inconsistent with the constitution, art. 4, § 2. cl. 1, which

¹ Reported by Russell H. Curtis, Esq., of the Chicago bar.

provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." So held *arguendo*.

4. SAME—FOREIGN CORPORATION—STATE STATUTE CONFINING TRUSTEES TO RESIDENTS DOES NOT AFFECT SUCH CORPORATION.

A state statute which declares a conveyance in trust of real or personal property to other than "a *bona fide* resident" of the state invalid, and which provides that a trustee's right shall cease upon his removal from the state, *held*, in view of surrounding facts, not to govern a conveyance in trust to a foreign corporation of property within the state.

5. SAME—CONSTRUCTION OF TRUST DEED—RIGHT TO FORECLOSE NOT BARRED.

Provisions in a trust deed made by a railway corporation to secure its bondholders, which prohibit the trustee, without the consent of the holders of a majority of the bonds, to declare the principal due before maturity, to take possession of the mortgaged property, operate, or sell it, or to maintain a foreclosure suit for the principal before the maturity of the bonds, do not abrogate the right of the trustee, at the request of a single bondholder, or the right of a single bondholder himself, if the trustee refuses to act, to foreclose, upon breach of the condition of the deed by the corporation's failure to pay interest.

6. RAILROADS—MORTGAGE—FORECLOSURE FOR INTEREST DUE—FORM OF DECREE.

In a suit by a trustee suing for the benefit of bondholders to foreclose a trust deed against a railway corporation to enforce the payment of overdue interest, complainant, unless restrained by the trust deed, is entitled to a decree *nisi* for the amount due and for a sale of the mortgaged property upon default in payment. Upon payment of the amount due, the foreclosure decree will be suspended until default again occurs in the payment of interest.

7. RECEIVER—HIS APPOINTMENT DISCRETIONARY.

The appointment of a receiver rests in the sound discretion of the court. Defendant's insolvency may or may not be cause for appointing receiver.

In Equity.

B. H. Bristow, J. E. McDonald, H. B. Turner, and C. N. Steele,
for complainant.

J. H. Choate, J. J. McCook, Charles L. Atterbury, Edward Daniels,
C. W. Fairbanks, and Jacob S. Slick, for defendants.

GRESHAM, J. The Chicago & Atlantic Railway Company, on the thirteenth of June, 1881, by its deed of trust, conveyed to the Farmers' Loan & Trust Company, a New York corporation, and Conrad Baker, a resident and citizen of Indiana, its line of railway extending from Marion, Ohio, to Chicago, together with all other property of every character which it then owned or might thereafter acquire, to secure an issue of 6,500 bonds of \$1,000 each, payable on November 1, 1920, with interest at 6 per cent. per annum, payable semi-annually on the first days of May and November. On the fifteenth day of September, 1883, the railway company, by a second trust deed, conveyed the same property to the Farmers' Loan & Trust Company and George J. Bippus, a citizen of Indiana, to secure an additional issue of 5,000 bonds of \$1,000 each, payable on the first day of August, 1923, with interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of February and August. This suit is brought by the Farmers' Loan & Trust Company against the Chicago & Atlantic Railway Company and George J. Bippus, the co-trustee in the second mortgage; Conrad Baker, the co-trustee in the first mortgage, being dead.

Section 2988 of the Revised Statutes of Indiana, which was in force when the trust deeds were executed, provides that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing, (except wills,) for any purpose whatever, who shall not be at the time a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the act to which this is supplemental."

It is urged that inasmuch as the Farmers' Loan & Trust Company is a New York corporation it was not capable, under this statute, of acting as trustee in the trust deed or mortgage, and that it cannot, therefore, maintain this suit. The Chicago & Atlantic Company conveyed its property in trust to secure its bonds, and it would not, perhaps, as between itself and the bondholders, be permitted to urge this objection against the validity of its own solemn act. Gov. Baker, the co-trustee, who died before the suit was brought, and whose successor in the trust has not been appointed, was a resident of Indiana when the trust deed was executed. This satisfied the requirements of the Indiana statute. No court would be expected to hold that the trust deed was void because one of the trustees was not a resident of Indiana. If it be true that the Farmers' Loan & Trust Company was not capable of acting as trustee to the extent of taking title to so much of the mortgaged property as was situated within the state, or that its designation as trustee was to that extent inoperative and void, nevertheless the trust deed was valid when executed, and a trust is never permitted to fail for want of a trustee. The trust property was conveyed as an entirety to secure the payment of the bonds and coupons, and it is not claimed that the Farmers' Loan & Trust Company was incapable of acting as trustee so far as the trust embraced property within the states of Ohio and Illinois. Suits between the same parties, asking the same relief, commonly called "ancillary" suits, may be, and presumably have been, instituted in the circuit court of the United States for the Northern district of Ohio and the Northern district of Illinois, and the court in either of those jurisdictions would have authority to decree a sale of the mortgaged property as an entirety. *Muller v. Dows*, 94 U. S. 444.

If, under such circumstances, a court of equity has authority to allow the requesting coupon-holders to be made co-complainants with the Farmers' Loan & Trust Company, it would be expected to exercise it instead of dismissing the bill. The facts of this case would perhaps justify the exercise of that authority. But if the Chicago & Atlantic Company be not estopped from denying that the Farmers' Loan & Trust Company was capable of acting as trustee, and if the court is not

authorized to allow the coupon-holders, at whose request the suit was brought, to be substituted as complainants or made co-complainants with the Farmers' Loan & Trust Company, the bill must be dismissed, unless the statute relied on is invalid.

It will be observed that this statute does not prohibit foreign corporations from doing business in this state. Obviously that was not the design of the legislature. It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any state of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship.

Section 2 of article 4 of the constitution of the United States declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." "Attempt will not be made," say the supreme court of the United States in *Ward v. Maryland*, 12 Wall. 418, "to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate. * * *

But it may be said that the word "person," as used in the statute, includes artificial as well as natural persons, and that the statute is capable of enforcement as against corporations only. A careful reading of the act will show that it is not capable of such construction. The latter clause of the section says: "If any person, after his appointment as such trustee, shall remove from the state, his right as trustee shall cease." A domestic corporation cannot remove from

the state; and if the words "a foreign corporation" be read into the statute, they are qualified by the words "*bona fide* resident," and it is plain that a foreign corporation cannot become a "*bona fide* resident" of a state which does not create it. A corporation is a mere creation of local law, having no legal existence beyond the sovereignty where created. It dwells in the place of its creation and cannot migrate. *Paul v. Virginia*, 8 Wall. 168. How, then, can a corporation of another state become a *bona fide* resident of Indiana? It is true that the existence of a corporation may be and frequently is recognized abroad by the enforcement of its contracts made abroad as well as at the place of its domicile, and in other ways; but that is done purely upon considerations of comity.

In March, 1879, a statute was enacted by the legislature of Indiana, which declared that if any foreign corporation brought a suit in the federal courts for the district of Indiana, or removed a suit pending in a court of the state to such federal courts, it should thereby forfeit its right to transact business in the state, and be prohibited from thereafter transacting any business therein. The passage of this act sufficiently accounts for the phraseology of the statute relied on in this suit. Having gone as far as the legislature deemed it necessary to go in the enactment of the statute of March, 1879, it was doubtless thought unnecessary to make this act, which was passed two months later, apply to foreign corporations as well as natural persons. In enacting the latter statute, the legislature no doubt deemed the former one sufficient to deter any person, association, or corporation from appointing a foreign corporation to act as trustee in any deed or mortgage, and that additional legislation was necessary only to prevent the appointment or designation of natural persons to act as such trustees. The Farmers' Loan & Trust Company was therefore capable of accepting the conveyance as trustee, and of acting as such, notwithstanding the state statute.

In the resolution of the board of directors which authorized the issuance of the bonds, and the execution of the trust deed or mortgage to secure them, it was declared that the security should be for the payment of both principal and interest, and it was directed that proper provisions should be inserted in the trust deed or mortgage to secure to the holders of the bonds payment of principal and interest according to their tenor. It was declared in the trust deed or mortgage that it should be a security for the payment of the bonds, with the interest maturing thereon ratably, and without discrimination, according to their tenor and effect; that the trustees should hold the property so conveyed to them for the benefit, security, and protection of persons and corporations, firms and partnerships, who should hold the bonds and interest warrants, or any of them, and for the purpose of enforcing the payment thereof; that until default should be made in any portion of the interest or principal of the bonds, or any of them, or in any other requirement, the railroad

company should continue in possession, control, and management of the mortgaged property, with the right to receive and use the tolls, income, and profits therefrom; that upon default in the payment of the interest or principal of any of the bonds, and such default continuing for six months after maturity and demand of payment, at the request in writing of the holders of at least a majority of the bonds then owing and outstanding, the trustees might and should take possession of the mortgaged property, and operate the same until the net receipts or earnings should enable them to pay the overdue interest, after which possession of the mortgaged property should be restored to the railroad company: provided, however, that if the holders of at least a majority of the outstanding bonds should elect and notify the trustees in writing, before the interest in default should be paid, that they (the bondholders) desired the principal of the outstanding bonds to become due, then, in that event, the trustees, instead of surrendering the mortgaged property to the railroad company, should retain possession of the same, and apply the earnings, and any surplus which might remain in their hands, to the satisfaction of the interest and principal of the outstanding bonds ratably, and without discrimination or preference, and the trustees should operate and manage the railroad until the outstanding bonds and interest should be paid in full. It was further declared in the trust deed that in case of default in the payment of the interest and principal of any of the bonds, either by their terms or under the conditions above stated, it should be lawful for the trustees, after entry, or without entry, upon the written request of at least a majority of the holders of the bonds then outstanding, to sell and dispose of the mortgaged premises.

Article 4 of the trust deed reads as follows:

"The party of the first part covenants and agrees to and with the party of the second part, and their successors in said trust, and to and with each person or persons who shall or may become holder or holders of any of the said bonds, their heirs, executors, administrators, and assigns, jointly and severally, that in case of default in the payment of the interest or principal of any of said bonds, and such default continuing for the space of six months after maturity and demand of payment, and the principal of said bonds shall have become due, either by the terms thereof or at the election of the bondholders as aforesaid; or in case of default in the performance of any of the other covenants or conditions herein contained on the part of the party of the first part, and such default continuing for the space of six months after notice is given in writing by the parties of the second part, or their successors in said trust, or by a holder of any of said bonds, to perform the same,—then, at the request in writing of the holders of at least a majority of the bonds then owing and outstanding, the parties of the second part, or their successors in said trust, after entry as aforesaid, or without entry, may or shall foreclose the equity of redemption of the party of the first part, and of all other persons having any legal or equitable rights or claims against or in or to the mortgaged premises, or any part or portion thereof, by proceedings at law, or in equity, in any court of competent jurisdiction, whether of the states through which the said road may run or of the United States; and it is

hereby expressly understood and agreed that upon proper indemnity to the trustees a majority in interest of the holders of the bonds secured hereby shall, from time to time, have a right to direct and control the proceedings for the foreclosure of this mortgage."

The Chicago & Atlantic Company has paid no interest on either class of bonds. The Erie Company paid out \$584,850 in taking up first mortgage coupons, which became due prior to November 1, 1884. All the interest that became due under the first mortgage on and subsequent to the last-named date remains unpaid. Including the coupons taken up by the Erie Company, the interest due on the first mortgage bonds is \$1,669,850. The coupons which became due on November 1, 1884, and May 1, 1885, had remained unpaid for six months after maturity and demand before this suit was brought. It was brought at the request of the owners of past-due coupons, after payment had been demanded and refused, and against the wish and protest of the holders of a majority of the bonds, who in open court moved that the suit be dismissed.

It is contended that no action can be taken by the trustees looking to the foreclosure of the mortgage or the appointment of a receiver without the written request or direction of the holders of at least a majority of the bonds, such consent or request being the basis of all action for the enforcement of the trust; and that no right of action exists or can exist in favor of any one to enforce the lien of the mortgage for interest only. Under the provisions of the trust deed, without the direction or consent of the holders of a majority of the bonds the trustee cannot take possession of the mortgaged property, or declare the principle due before maturity, according to the terms of the bonds, nor without such consent can the trustee operate or sell the property, or commence proceedings to foreclose the principal before maturity, in 1920. It does not follow, however, that because this power is given to the holder of a majority of the bonds that the trustee, at the request of a minority, or even of a single bondholder, may not commence proceedings to foreclose for the non-payment of interest; or if, on proper demand, the trustee refuses to bring suit, that a minority, or even a single bondholder, may not sue. Failure to pay a single installment of interest is a breach of the conditions of the trust deed.

The Chicago & Atlantic Company agreed to pay interest on each bond, and it conveyed its property to trustees "for the benefit, security, and protection of the persons and corporations, firms, and partnerships who should hold the bonds and interest warrants aforesaid, or any of them, for the purpose of enforcing payment thereof according to their tenor and effect." The power of a majority to control proceedings to foreclose for the payment of principal when it shall become due, at the election of a majority, before maturity in 1920, is not exclusive of the right which a single bondholder has to enforce the security for the non-payment of any installment of interest on

any bond. This right of a minority, or even a single bondholder, does not depend upon the consent of a majority. If it did, the company might refuse to pay interest on the bonds held by a minority until maturity according to their terms, and even after that time, if some of the counsel for the defendant are correct in their position that neither before nor after maturity can the trust be enforced without the consent of at least a majority. The right which is asserted by the majority must be found in plain and explicit terms in the mortgage or it will not be recognized. It cannot exist by mere implication.

It is true that in article 4 of the mortgage it is declared "that, upon indemnity to the trustees, a majority in interest of the holders of the bonds secured hereby shall, from time to time, have a right to control the proceedings for a foreclosure of this mortgage." The proceedings here referred to are the proceedings to enforce the trust for the payment of principal which shall become due, under the provisions of the mortgage, at the election of the holders of a majority of the bonds before maturity according to their terms. The right is given to control the proceedings for a foreclosure, not *all* proceedings for a foreclosure.

Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47, S. C. 1 Sup. Ct. Rep. 10, was a suit to foreclose a mortgage or trust deed executed by the railroad company to secure both principal and interest of an issue of bonds. The mortgage provided that if any interest should be permitted to continue in default after presentment and demand of payment, the trustees might declare the principal of all the bonds immediately due and payable, and notify the company thereof; and that, upon the written request of the holders of a majority of the bonds, the trustees should proceed to collect the principal and interest of all the bonds by foreclosure and sale, or otherwise, as provided in the mortgage. There was default in the payment of coupons that fell due on October 1, 1873, but a majority of the bondholders thereafter funded these coupons; the coupons not funded, however, continuing unpaid for more than six months. The circuit court decreed that the entire debt, both principal and interest, was due, and ordered the mortgaged property sold unless payment should be made within 20 days. It was held, Justice MATTHEWS delivering the opinion of the court, that although the principal of the bonds was not shown to be due, it plainly appeared that interest upon a minority of them was in default; that the record failed to show that any of the coupons not afterwards funded had been presented and payment thereof refused; and that a written request from a majority of the holders of the bonds to the trustees was necessary to authorize them to declare the principal due, and institute proceedings for its collection, and no such request appeared. In speaking of the right to maintain the suit for non-payment of interest, the court said:

"But inasmuch as by the terms of the first article the conveyance was declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminated upon a default in the payment of interest as well as the principal of any of the bonds, we are of opinion that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on non-payment of any installment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any of the others or any of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them. It follows from the nature of the security, and arises upon its face, unless restrained by its terms."

The complainant is entitled to a decree *nisi*, ascertaining the amount due upon the coupons which are not held by the resisting bondholders, and if the amount, when ascertained, is not paid within a reasonable time, to be fixed by the court, the complainant, for the benefit of those whom it represents in this suit, will be entitled to a decree for the sale of the mortgaged property, barring all rights subordinate to the mortgage. The demurrer to the bill is overruled.

The motion for the appointment of a receiver remains to be determined.

The Erie road extended from New York to Salamanca, and the New York, Pennsylvania & Ohio road, which had been leased by the Erie Company, extended from the latter place to Marion, Ohio. Hugh J. Jewett was then president of the Erie Company, and he, and others associated with him, realizing the importance to that company of owning or controlling a through line from the city of New York to Chicago, which would enable the Erie Company to compete with other through lines for western business, caused the Chicago & Atlantic Company to be organized, and its road built. The road of the latter company was built to be operated as a part of the Erie line, and in the interest of that company. About the time the first mortgage was executed the Erie Company, the Chicago & Atlantic Company, and other companies, as well as certain individuals, entered into contracts providing for the construction and operation of the new road as the western extension of the Erie line; for the negotiation of the first mortgage bonds; and for advancements to be made by the Erie Company to pay the interest on those bonds; and for other purposes. The Erie Company agreed that it would advance money to complete the road should the proceeds of the bonds and the subsidies collected prove inadequate for that purpose; that it would advance money to pay interest accruing on the bonds previous to the completion of the road; and that "from its own gross earnings derived from all business passing from and to the Chicago & Atlantic Company, to the extent of such gross earnings received during the fiscal year in which any installment of interest on the bonds shall

fall due, make good any deficiency in the net earnings of the Chicago & Atlantic necessary for the payment of such installment of interest on said first mortgage bonds." The Chicago & Atlantic Company agreed that it would, after paying interest on its first mortgage bonds out of its gross earnings, reimburse the Erie Company out of such gross earnings for advancements made by that company to complete the new road, and to pay interest on the first mortgage bonds, and that the Erie Company should have a lien on the net earnings for such advancements in the order named. Besides what was realized from the sale of the first mortgage bonds and subsidies,—the latter amount being inconsiderable,—the Erie Company advanced all the money that was used in the construction of the Chicago & Atlantic's road, and all interest which is not in default has been paid by that company. It was also agreed that the Chicago & Atlantic Company should deliver to the Erie Company at Marion, all freight and passengers which it could control, destined to points reached by the Erie Company, and in return that the latter company should deliver to the Chicago & Atlantic Company, so far as it could control the same, an amount of west-bound traffic which should bear to the whole amount of the Erie Company's west-bound traffic for Chicago and points beyond the same proportion that the amount of east-bound traffic received by it from the Chicago & Atlantic Company would bear to the whole amount of the Erie Company's east-bound traffic. It was also agreed that Hugh J. Jewett should hold 90 per centum of the capital stock of the Chicago & Atlantic Company, as trustee, with irrevocable power to vote the same until all moneys advanced by the Erie Company to the Chicago & Atlantic Company should be repaid, and until the principal and interest of the first mortgage bonds should be fully paid.

The Chicago & Atlantic Company was never able to pay operating expenses and interest on its bonds. Being in want of money and embarrassed, that company, in July, 1883, entered into a further agreement with the Erie Company. By this agreement it was provided that the latter company should make additional advances to the Chicago & Atlantic Company, which should make a second mortgage upon its property and franchises to secure an additional issue of bonds amounting to \$5,000,000, to be placed in the hands of Mr. Jewett, as trustee, to be held as collateral security for advances of money made, and to be made, with authority, as such trustee, to pledge or sell the bonds. The bonds and mortgage were executed. Prior to this time the Erie Company had advanced to the Chicago & Atlantic Company more than \$1,500,000, and the Erie Company claims to have made further advances after the second mortgage bonds were placed in Mr. Jewett's hands as trustee. Mr. Jewett borrowed \$1,500,000 from Grant & Ward, which the Erie Company received and credited upon the account of the Chicago & Atlantic Company. This loan was secured by a deposit by Mr. Jewett of \$2,500,000 of the second

mortgage bonds. Notes made payable to Grant & Ward by the Chicago & Atlantic Company, and indorsed by the Erie Company, amounting to \$1,500,000, were delivered to Grant & Ward at the same time. It was the understanding, however, between Grant & Ward and the two companies that these notes were to be held and used as memorandum notes, and not otherwise. Before failing in May, 1884, Grant & Ward pledged both the notes and the bonds to various banks and individuals as collateral security for loans, the pledgees being ignorant of the arrangement under which Grant & Ward received the notes and bonds. The Chicago & Atlantic Company failed to take up any of these notes or bonds, and in order to protect its credit as indorser the Erie Company was obliged to pay over a million dollars on the notes, and in doing so it obtained possession of 761 of the second mortgage bonds. It follows that to the extent that the Erie Company took up the notes which it had indorsed, the indebtedness of the Chicago & Atlantic Company was not reduced.

Since Mr. Jewett ceased to be president of the Erie Company he has claimed that the stock of the Chicago & Atlantic Company was deposited with him, not as president of the Erie Company, but as a personal trust, and he now insists that he has the irrevocable right, as such trustee, to vote the stock, and thereby maintain control of the Chicago & Atlantic Company, without regard to the wishes of the Erie Company. The holders of the first mortgage bonds, who claim the right to control these proceedings, are acting in concert with Mr. Jewett.

The facts abundantly show that he was made trustee to hold the stock of the Chicago & Atlantic Company, with authority to vote it, because he was president of the Erie Company, and could be relied upon to control and manage the Chicago & Atlantic road as the western extension of the Erie line. If the Erie Company was expected to advance money to complete the construction of the new road, and to pay interest on the bonds, and thus take care of the credit of the Chicago & Atlantic Company, it was not unreasonable it should, in some way, be protected against unfriendly management of the new road. The Erie Company's stockholders and creditors no doubt thought the placing of the stock in Mr. Jewett's hands would afford them ample protection. It was provided in the contract which designated Mr. Jewett as trustee, that in the event of his death or resignation, the trust should devolve upon such person as he might have previously designated to succeed him, and in default of such designation that the trust should devolve upon such person as the Erie Company might designate.

This language plainly indicates that Mr. Jewett was authorized to act as trustee, with power to vote the stock, because he was president of the Erie Company, and as such would see to it that the Chicago & Atlantic road was operated as a part of the Erie line. His present position as to his powers and duties as trustee are inconsis-

ent with the views which he entertained while president of the Erie Company. In his annual report to the stockholders of that company in 1882 he said:

"To secure the construction of the road, and its future management to the satisfaction of the parties proposing to purchase the bonds, it was agreed that the entire proceeds thereof, together with certain subsidies which had been voted by the townships along the line, should be deposited with the president of the New York, Lake Erie & Western Railroad Company, in trust, and the duty was devolved upon him of seeing to the proper application thereof to the construction of the road. It was further stipulated that ninety per cent. of the stock should also be deposited with him, with irrevocable proxy to vote thereon during the life of the bonds, (thirty years from the date thereof,) thereby securing to your company the absolute control of the road for such period. * * * By this means your company secures access to the business and markets of Chicago by a line of road as much under its control as though it had advanced all the money needed for its construction, and assumed all the obligations incident to its maintenance and operation."

Mr. Jewett now says that the stock was not deposited with him, as president of the Erie Company, with irrevocable power to vote the same as such president during the life of the bonds, and that it was not the intention that the Erie Company should thereby secure the absolute control of the new road for that period.

The court cannot be expected, at this stage of the litigation, to pass upon the validity of the contracts already referred to, or to determine the rights, duties, and liabilities of the parties thereto. Although the two companies are natural allies, and their roads should be operated as a single line, there is little hope of harmonious action until a change occurs in the management of one or both. Each accuses the other of violating contract obligations. Mr. Jewett controls the action of the Chicago & Atlantic Company, and that he is unfriendly and even hostile to the Erie Company, under its present management, admits of no doubt. It is claimed by him, and the holders of a large majority of the bonds who are acting in concert with him, that, without any change in the Chicago & Atlantic Company's management, the Erie Company should be required to pay the interest accrued and to accrue on the first mortgage bonds. The Erie Company appears to have advanced to the Chicago & Atlantic Company, from time to time, over \$2,000,000, the main consideration for which was the agreement that the latter's road should be operated as the western extension of the Erie line, and the only security that was given for these large advances was the pledge of the second mortgage bonds. The facts thus far brought to the attention of the court do not justify the assertion that since Mr. Jewett ceased to be president of the Erie Company its violations of the traffic contract have reduced the earnings of the Chicago & Atlantic Company equal in amount to the latter's indebtedness to the former. The Chicago & Atlantic road was first operated for through business three years ago. It is not denied that it failed to pay operating expenses the first and second years. The

statements submitted show, however, that during the third year its earnings exceeded its operating expenses by \$58,127, which sum was not sufficient to pay the amount remaining due on operating expenses for the first and second years. Exclusive of the 761 second mortgage bonds which the Erie Company acquired, as above stated, the principal of the outstanding bonds amounts to over \$8,000,000. The interest which is due on the first mortgage bonds, including the coupons taken up by the Erie Company, amounts to \$1,169,850, and all the interest which has accrued upon the second mortgage bonds is unpaid, the interest now due on both classes of bonds being more than \$1,500,000. It is not denied that while Mr. Jewett was president of both companies, the money advanced by the Erie Company to the Chicago & Atlantic Company amounted to more than \$1,500,000, and the former claims, with apparent foundation, that after the execution of the second mortgage it advanced \$700,000 more.

But without reference to the fact that the Erie Company is vitally interested in the solvency of the Chicago & Atlantic Company, and whether the latter is indebted to the former or not, the owners of bonds amounting to \$105,000, secured by the first mortgage, are entitled to their interest; and it is no answer to the motion which the trustee has made in their behalf for the appointment of a receiver that the Erie Company has not kept faith with the Chicago & Atlantic Company. Mr. Jewett has either been unwilling or unable to establish business relations with any other trunk line, and the facts do not justify the hope that he can operate his road without some change in its relations, and pay operating expenses and interest on its bonds. In fact, the Chicago & Atlantic Company is badly embarrassed, and probably insolvent. It may be that a change in management would improve its condition, and enable it to produce an income, after paying operating expenses, sufficient to pay its debts, and interest on such of its bonds as are not held by the majority of the holders who are united with Mr. Jewett in resisting this suit and motion. But, in any event, the owners of the past due coupons are entitled to payment, and it may become necessary for the court to take possession of the mortgaged property, and operate it through a receiver, for their benefit. The physical condition of the mortgaged property is good, and taxes and labor and supply claims are not in arrears.

The appointment of a receiver rests in the sound discretion of the court; mere insolvency may or may not call for such action. A ruling on the motion for the appointment of a receiver is deferred.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co.
and others. (CLEARY, Intervenor.)¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

1. RAILROADS—CROSSINGS—GATES—NEGLIGENCE.

At railroad crossings in populous cities, where gates and watchmen are provided, teamsters have a right to suppose, when the gates are opened and no warning to the contrary is given, that they can proceed with entire safety.

2. SAME—DUTY OF ENGINEER.

Where, when the gates are opened, a teamster starts to drive across the tracks, and an engineer in charge of an approaching train, sees him, it is the engineer's duty to stop his train, and in that way avoid an accident if possible.

3. SAME.

Where, under such circumstances, the teamster does not notice the train, and the engineer fails to stop in time, and runs over the wagon and team, the railroad company is liable.

In Equity. Exceptions to master's report.

Petition for \$500 damages for negligently running over a wagon and team belonging to the intervenor. The facts, as shown by the evidence introduced, are substantially as follows: At the Twenty-first street crossing of the Wabash tracks, in the city of St. Louis, there are two gates,—one on the north and one on the south side of the tracks,—which, when closed, prevent teams from attempting to cross. They are both in charge of an employe of the receivers, and are kept closed when the tracks are in use, and open when they are free. On the morning of April 29, 1885, the intervenor's team, together with others, had been waiting for some time at the north gate for an opportunity to pass south, the gates being closed. At that time a switch-engine and crew were switching a Wabash car on the track near the north gate, and the rear end of the car was about on a line with the east side of Twenty-first street, the switch-engine being still further east. At the precise time of the accident, and perhaps for a minute or more before, this engine and car were standing still. Next south of this switching train was a second switch or side track, and next south of that the main Wabash track. On the last-named track the Keokuk train, operated by the receivers, was coming west from the Union depot, on time, at the usual rate of speed. A team had passed north over the tracks, and reached the north gate in the rear of the switching train, and the watchman had raised the gate part way to let it out. At that instant the intervenor's driver started through under the partially raised gate. Several parties cried out to him to stop, but he either did not hear or paid no attention, and drove right on to the main Wabash track, looking neither to the right or left, and his team was run over by the outcoming train, and both horses fatally injured. The wagon also was damaged. It seems that the driver

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

did not see or notice the train, but the engineer in charge of the train saw him coming in time to have stopped the train and avoided the accident, but, supposing the driver would stop, did not apply the brakes until it was too late. The master reports that inasmuch as the train might have been stopped in time by the use of proper diligence, the intervenor is entitled to recover.

I. C. Terry, for intervenor.

H. S. Priest and *Geo. S. Grover*, for receivers.

TREAT, J., (*orally*.) The exceptions are overruled, not only for the reasons stated by the master, but for the following additional reasons: At the crossings in a populous city, where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchmen, that they can proceed with entire safety. If accidents should happen through the gross negligence of the management of the gates by the watchmen connected therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of the passenger or pedestrian in crossing, under such circumstances, cannot exonerate the railway company, whose duty it was to protect said crossing, and give warning as to the safety thereof.

Master's report confirmed.

DODGE v. BRIGGS and others.

(*Circuit Court, S. D. Georgia, W. D. March 23, 1886.*)

1. PRINCIPAL AND AGENT—TITLE OF AGENT TO LAND PURCHASED FOR JOINT-STOCK COMPANY.

Where the agents of a joint-stock company buy lands for it; pay the purchase money with the company's funds; always declare that such lands belong to the company; represent themselves always as the agents of the company in the management of the lands; take their salaries as such; and never claim such lands as their own, although the deeds were taken in their names, —they took no title as individuals, but the title was in the company.

2. SAME—RIGHTS OF HEIRS OF AGENT.

The heirs of such agents, as to this title, occupy no position superior to that of their ancestors; they take no title, because their ancestors had none.

3. VENDOR AND VENDEE—ADMISSION AGAINST TITLE BY FORMER OWNER.

A party deriving title from another, mediately or immediately, is bound by the admissions against that title made by the latter while the title is in him. When such admissions so made are clear and uncontradicted, they are conclusive.

4. SAME—NO TITLE IN VENDOR—BONA FIDE PURCHASER.

The doctrine of *bona fide* purchaser without notice does not apply where there is a total absence of title in the vendor. The good faith of a purchaser cannot create a title where none exists.

5. DEED—FAILURE TO RECORD—PRIORITY—SUBSEQUENT CONVEYANCE.

On a failure to record a deed within time, a subsequent deed, taken with-

out notice of the first, and properly recorded, has priority; but such deed must be from the same vendor, and a deed from the heir of the vendor has no such priority.

6. SAME—QUITCLAIM DEED—NOTICE.

The doctrine of *bona fide* purchaser without notice does not apply to conveyances made by quitclaim deeds.

7. VENDOR AND VENDEE—TENDER OF QUITCLAIM.

Where a quitclaim deed is tendered by the apparent owner to one contemplating the purchase of land, it is a fact sufficient to awaken the suspicion of the latter as to the validity of the title, and to put him on inquiry, and he is chargeable with notice of such defect of title, as he might readily have ascertained on inquiry.

8. EQUITY JURISDICTION—MULTIPLICITY OF SUITS—CLOUD ON TITLE.

A court of equity has jurisdiction to prevent fraudulent and irreparable injury, where a great multiplicity of suits will be avoided, and when it is necessary to remove a cloud from the title to lands. Especially is this true, where the object of the bill is to declare and enforce a trust against a multitude of respondents who are claiming under one fraudulent title.

9. SAME—RELIEF ALLOWED—FRAUD.

While it is true that in all proceedings to enforce the title to land the complainant must rely on the strength of his own title, it is also true, where the respondents have been guilty of such fraud as would defeat the complainant or his legal title, he may, in equity, with suitable allegations, and with sufficient proof, supply such defect in his legal title as their fraud has created. His equitable right, with such satisfactory proof of their fraud, is equivalent to the legal title.

10. EVIDENCE—ANCIENT DEED.

A deed more than 30 years of age, which has been acted upon, and under which the purchaser took possession, is admissible without proof of execution; and an ancient record, coming from the proper custody, corroborated by proof that it was a part of the actual transfer of the property therein mentioned, is admissible.

11. STATE—RIGHT TO LANDS PURCHASED IN ANOTHER STATE.

While the comity which exists between the states of the Union will not necessarily legalize the purchase and the possession by one state of lands in another state, still such comity would support such a transfer, for value, as would prevent a sister state from loss; and, in the absence of any proceeding to vitiate the title, in this case it will be presumed that the state of Indiana took the lands for a legitimate purpose, and with permission of the state of Georgia, and the respondents have no right to raise this question.

In Equity.

Lanier & Anderson and R. K. Hines, for complainant.

Luther A. Hall and Hill & Harris, for defendants.

SPEER, J. There is involved in this controversy the title to 300,000 acres of land. The lands are heavily timbered with yellow pine, and derive their chief value from that fact. They are of the alleged value of \$150,000, but this is probably a very low estimate of their value. They lie in the counties of Telfair, Dodge, Pulaski, and Laurens. The cause came on for a final hearing in November last, and the arguments of counsel exhibited great ability and research, ample preparation, and unusual force and precision of statement. Because of the importance and difficulty of the issues involved, and the multitude of questions arising in the consideration of the record, I have, until now, been unable to reach a satisfactory conclusion; and while

regretting this delay, I have deemed it proper to take the time, and carefully to test, in the light of principle and authority, the results of my examination.

The bill is filed by George C. Dodge, a citizen of the state of New York, against Luther A. Hall, Oliver H. Briggs, and H. G. Sleeper, who are alleged to be operating under the firm name of Sleeper, Hall & Briggs, in Dodge county, and against many other parties in this district, who are alleged to be trespassers on various parcels of the land. The respondents are citizens of Georgia, and of the several counties in which the land is situated, save the heirs of Colby, Chase, and Crocker, to whom more explicit reference will be made,—these are non-residents.

The complainant alleges that he is the owner of the lands in controversy; that his title is traceable through a period of half a century, and originates in grants from the state of Georgia. The taxes have been uniformly paid. There are 1,500 separate lots. The lands belong to that class termed "wild lands." Being unoccupied and uncultivated, and widely dispersed in five counties, it is impossible, without extraordinary expense, to protect them from depredation. From this cause complainant states that he has already suffered heavily. Complainant further avers that about a year previous to the filing of the bill the respondents Oliver H. Briggs, Luther A. Hall, and H. G. Sleeper concocted a plan to deprive him of the use and enjoyment of his lands. They surreptitiously ascertained the fact that one of his deeds, viz., a deed from Stephen Chase, Abraham Colby, and Samuel C. Crocker had been defectively executed, as they suppose; that Briggs, Hall & Sleeper quietly went to work and procured powers of attorney from the heirs at law of Colby, Chase, and Crocker, who are named in the bill, under which power of attorney the three alleged conspirators have assumed the right to sell and lease the said lands, and to dispose of the timber; that Luther A. Hall, one of the alleged conspirators, is an attorney at law, but that he has combined and conspired with the others for the use and benefit of the three, and their compensation depends upon the success of their project; that Briggs, Hall & Sleeper are actively engaged in promoting and encouraging trespassers on these lands; that they sell to ignorant and innocent persons lots of the land, and sell the timber, and lease tracts of timbered land for turpentine farms; they represent that complainant has no title to the land. These wrongs have seriously injured the complainant. Moreover, the alleged conspirators, by interviews and publications in the newspapers, and by their sedulous activity in slandering the title of the complainant, have deprived him of the ability to sell these lands; that these damages are irreparable on account of the insolvency of Briggs, Hall & Sleeper, and their confederates. All of the other alleged trespassers, with one or two exceptions, are likewise insolvent, or beyond the jurisdiction of the courts.

The remaining allegations of the bill are, substantially, as follows: In the year 1833 a number of persons in the state of Maine, conceiving it a profitable enterprise, organized a stock company known as the Georgia Lumber Company. Their object was to purchase tracts of heavily-timbered pine lands in Georgia; to send down the skillful lumbermen from the pine forests of Maine to build saw-mills; and to develop, at that early day, what has since proven to be a valuable and lucrative resource of the state,—its timber interest. Before incorporation it was called the Georgia Land Company; afterwards the Georgia Lumber Company. Stephen Chase, Abraham Colby, and Samuel E. Crocker were commissioned as its agents to go to Georgia, and to make purchases of lands for the company. The agents performed this service, and purchased the lands, in the year 1834, from Peter J. Williams, of Baldwin county. The charter of the Georgia Lumber Company was procured in Georgia in 1834 by Stephen Chase; that Colby, Chase, and Crocker acted in the state of Georgia as the agents of the company, and uniformly represented themselves as such, and never set up any claim to these lands in their own right. Afterwards, 18,000 acres of the land was purchased in the same manner, and by the same agents, from Josiah Flournoy. Colby, Chase, and Crocker are all dead, and for many years. Their heirs never claimed the lands until they were induced to make the power of attorney to Briggs, Hall & Sleeper; and but for the fraudulent representation of these alleged conspirators, for their own selfish purposes, no such claim would ever have been interposed. The deed from Peter J. Williams to Stephen Chase, Abraham Colby, and Samuel E. Crocker was by mistake made to them in their individual names, but not as agents of the Georgia Land or Lumber Company. Complainant further charges that Briggs, Hall & Sleeper are proceeding to make a number of contracts for lots of land lying in different counties, and with a large number of persons, which will involve him in multiplicity of suits to protect his interest; that Briggs, Hall & Sleeper are not recording these contracts, but are concealing them from complainant; and that the parties with whom they are contracting are building shanties and cutting timber on his lands, to his great and irreparable injury. Complainant alleges that he has no adequate remedy at law; and prays that the defendants, all discovery being waived, shall be held to account for the rents and profits of the lands which they have appropriated to their own use, and for all damages; that the contracts, leases, powers of attorney, and other instruments of writing may be delivered up and canceled, in order to remove the cloud from the title of complainant; that Briggs, Hall & Sleeper, and their agents, be enjoined from further interfering with the lands, and from making sales, leases, and contracts of any description thereto; and that the alleged heirs at law of Colby, Chase, and Crocker be likewise enjoined; and that the numerous trespassers be enjoined from further trespassing on or using said lands for their own purposes, in any manner.

On the nineteenth of January, 1885, an amendment to the bill was filed, locating the residence of the several heirs at law of Colby, Chase, and Crocker, and praying that they be made parties. It charges, further, that since the filing of the original bill these alleged heirs, with full knowledge of his title, made conveyance of all of said lands to one Silas P. Butler, a resident of the state of Massachusetts; these are quitclaim deeds, but there was no record of these deeds, or any attempt to record them, until after the bill was filed; that these conveyances were part of the scheme to defraud the complainant; that while purporting to be in consideration of the sum of \$300,000, that no such consideration passed; that Silas P. Butler is a person of no responsibility, but is an employe of John L. Colby, one of the heirs at law. It is prayed that Butler, and all of said heirs, be perpetually enjoined from claiming or setting up any title to the lands in controversy.

Briggs, Hall & Sleeper file a joint answer. They deny all combination. They say that the complainant never was the legal owner of said lands, and that no legal title has ever passed to him. They say that the deed purporting to have been made by Colby, Chase, and Crocker to the Georgia Lumber Company conveyed no title; that the charter of the Georgia Lumber Company is unconstitutional. They say, further, that the conveyance made by the corporation to the state of Indiana, and the deed of the state of Indiana to Martin R. Green, are void. They admit that under powers of attorney from the heirs of Colby, Chase, and Crocker they have sold and leased many of the lots of land mentioned in complainant's bill, but their action is fair, honest, and legal. They say, in November, 1883, the entire interest of the heirs whom they represent was sold to Silas P. Butler, of the state of Massachusetts, and that they now represent Butler as his agents and his attorneys at law. They deny their insolvency. They say that they have reason to believe that Stephen Chase, Abraham Colby, and Samuel E. Crocker own said land individually, as they purchased the same for their individual benefit, and in their individual names, and not as agents and trustees for any one. They deny that Colby, Chase, and Crocker represented themselves to be agents of the Georgia Lumber Company. They deny all manner of fraud or concealment.

Silas P. Butler, by plea, sets up the same facts as were set up in the answer by Briggs, Hall & Sleeper. He also files an answer, averring that Colby, Chase, and Crocker had title to these lands, and that he bought in good faith from their heirs. He avers that he bought in good faith, and for the consideration mentioned in the deeds, to-wit, \$300,000. He does not notice in his answer the charge that he was a mere employe of Colby, one of the heirs against whom the bill is filed.

Several of the respondents answer that they do not claim title under the heirs of Colby, Chase, and Crocker, and they put in evidence

the deeds under which they claim, which show an independent title to the lots therein described. All the other answers follow substantially that filed by Briggs, Hall & Sleeper.

Among other evidence, the complainant introduced the following chain of title: Plats and grants from the state of Georgia to Peter J. Williams, John Mitchell, George L. Deming, and Samuel Rockwell to all the lands in dispute in the bill; deed, George L. Deming to P. J. Williams, dated January 3, 1834; deed, John Mitchell to P. J. Williams, dated first January, 1834; deed, S. Rockwell to P. J. Williams, dated first January, 1834; copy and exemplification of last will and testament of Peter J. Williams; exemplified copy of the laws of the state of New York authorizing the formation of corporations; charter of the Georgia Land & Lumber Company, under the laws of the state of New York; deeds, (three,) Peter J. Williams (certified copy) to Stephen Chase, Abraham Colby, and Samuel E. Crocker, dated February 28, 1834, as recorded in Telfair, Pulaski, and Montgomery counties; certified copies of a deed from Stephen Chase, Abraham Colby, and Samuel E. Crocker to the Georgia Lumber Company, dated fifth January, 1835, being one copy each from the records of the counties of Laurens, Pulaski, Telfair, and Montgomery, Georgia; act of legislature of Georgia, approved December 17, 1834, incorporating Georgia Lumber Company; certified copies of deed from Georgia Lumber Company to the state of Indiana, dated twenty-fourth September, 1842; exemplified copy of a joint resolution of the general assembly of the state of Indiana, authorizing the governor or agent of state to sell lands in Georgia, approved January 16, 1849; certified copies of deed, Paris C. Dunning, governor of the state of Indiana, to Martin R. Green, dated first December, 1849; exemplified copy of an act of the general assembly of the state of Indiana, confirming the sale of lands in Georgia, to Martin R. Green, approved February 12, 1851; a regular chain of title from Martin R. Green to complainant.

It is clear from the voluminous evidence introduced on the trial that Peter J. Williams originally owned these lands; Colby, Chase, and Crocker bought from him; and the first question to be determined is, did they buy for themselves, or did they buy for the Georgia Lumber Company, projected and organized in Maine, 50 years ago?

On a review of the evidence, it is impossible to doubt the agency of these parties. Chase admitted that he, Colby, and Crocker were the agents appointed by the Georgia Lumber Company to buy these lands, and that they bought of Peter J. Williams. Chase is long ago dead, but before his death he became involved in litigation in Maine, and his sworn answer, there filed of record, not only sets up his agency, but there is attached as exhibits the original articles by which the Georgia Lumber Company was formed, and the resolution of the stockholders, and their letters appointing himself, Colby, and Crocker as the agents to make this purchase. It also appeared that, for several

years thereafter, Chase, Colby, and Crocker were the officers of the company; and an account is in evidence, rendered to the company by them, showing the charge made for services and traveling expenses; and, besides, there is evidence of witnesses still living which indisputably proves their agency. Their extensive correspondence with the company and with each other shows this also.

It is true that the deeds were made to them as if in their own right; but their contemporaneous letter to the company, and the overwhelming array of facts produced by the complainant, leads the mind irresistibly to the conclusion that they bought the lands for the company. They represented themselves as the agents of the company, and never, while living, so far as the evidence discloses, pretended that the lands were bought for themselves. How is it possible for the heirs of Colby, for instance, to avoid the effect of the statement of account in the proven handwriting of their ancestor, reading:

Georgia Lumber Company, Debtor, to A. Colby:

November 9, 1839.	For services as agent, 18 months,	-	-	\$1,000 00
" 9, 1839.	For expenses,	-	-	400 00

This is but one of numerous *indicia* unmistakably pointing to the existence of their agency.

Notwithstanding the fact of the mistake of the scrivener who drew the deeds, it is the duty of the court to regard Colby, Chase, and Crocker as standing in the attitude in which they place themselves by their admissions, and in which they are placed by the uncontradicted evidence of witnesses,—the cumulative testimony of sworn records given that force springing from the oath of a party testifying against his own interests.

Now, certainly, the heirs of Colby, Chase, and Crocker can occupy no position in this contest superior to that occupied by their ancestors. They take no title, because their ancestors had none. They are incumbered by all of the admissions made by their ancestors. *Wood v. McGuire*, 17 Ga. 303; *Same v. Same*, 15 Ga. 202. A party deriving a title from another, mediately or immediately, is bound by admissions against that title made by the latter while the title is in him. When such admissions so made are clear and uncontradicted, they are conclusive. This is the law as settled by the supreme court of this state, whose decision is paramount as to this question.

Now, Silas P. Butler is a purchaser from the heirs at law. He buys nothing which they did not possess, he occupies no better position than they do. They having no title, he buys none. A purchaser from the heir at law is in no better position than the heir from whom he purchased. The doctrine of *bona fide* purchaser without notice does not apply where the purchaser buys no title at all. If he buys from one who has title, and it should afterwards appear that another had a better title which he had not recorded, or that there was a fraud in the title of which he had no notice, the purchaser would be protected. But this doctrine cannot apply where no title whatever

existed in the vendor. The good faith of a purchaser cannot create a title. The heir inherits that property only to which his ancestor was entitled, and it follows, therefore, that a conveyance from the heir at law, to lands to which the ancestor had no title, is no better than a deed from a perfect stranger.

It is contended, however, that Silas P. Butler, having purchased from the heirs at law of Colby, Chase, and Crocker, may take advantage of the fact that the deed of Colby, Chase, and Crocker to the Georgia Lumber Company was not recorded. Assuming, for the sake of the argument, that Butler bought in good faith, and without notice,—a very violent assumption, as we shall presently see,—he must, nevertheless, make it appear that he purchased from one who had title. The deed from Colby, Chase, and Crocker to the Georgia Lumber Company is not, in equity, at all essential to the validity of the company's title. It is, in fact, nothing more than a supplementary admission of their agency. Their admissions previously and subsequently to the execution of the deed, and uniformly made, are equivalent to a link in the chain of the company's title. If this were not true, to enable Silas P. Butler to take advantage of the fact that the deed from Colby, Chase, and Crocker to the company was not recorded, he must have a subsequent deed from Colby, Chase, and Crocker themselves. He cannot rely on a recorded deed from their heirs at law. The unrecorded deed of the ancestor would divest the title of the heir. He does not occupy the same position as the subsequent purchaser; he is a mere volunteer.

Code Ga. § 2705, provides "that, on failure to record a deed within time, the record may be made at any time thereafter; but such a deed loses its priority over a subsequent deed from the *same vendor*, rendered in time, and taken without notice of the existence of the first." The words "same vendor" cannot be construed to mean the heir of the vendor. He, like his ancestor, would be divested of title by the unrecorded deed. *Webb v. Wilcher*, 33 Ga. 565.

In *Hill v. Meeker*, 24 Conn. 211, it is held: "A deed of land, not recorded until after the death of the grantor, is valid against the purchaser from his heir at law, although such purchaser has no knowledge of the existence of the deed." See, also, *Hancock v. Beverly's Heirs*, 6 B. Mon. 531.

It may also be observed that Butler, as to part of these lands, took a quitclaim deed from the heirs of Colby, Chase, and Crocker. Subsequently to the conveyances by quitclaim deed they made him deeds of warranty. To conveyances by quitclaim deed the doctrine of *bona fide* purchaser without notice does not apply. *Woodward v. Jewell*, 25 Fed. Rep. 691; *Villa v. Rodriguez*, 12 Wall. 323; *Dickerson v. Colgrove*, 100 U. S. 578. And the fact that a quitclaim deed was offered him was sufficient to awaken his suspicions as to the validity of the title,—to make him inquire,—and he is chargeable with notice of such invalidity of title in the heirs of Colby, Chase, and Crocker

as he might have ascertained by inquiry. *Adams*, Eq. 158; *Story*, Eq. Jur. 399, 400; *Cummins v. Boston*, 25 Ga. 284; *Bryant v. Booze*, 55 Ga. 438; *Wade*, Notice, 10 *et seq.*; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 109.

He was also shown the will of Stephen Chase, which will makes no reference to any lands in the state of Georgia. This fact in itself is sufficient to put a prudent man, who contemplates the purchase of 100,000 acres of land in Georgia, from the heirs of Chase, upon inquiry as to its title. The truth is, Butler, Briggs, Hall, and Sleeper, and the heirs of Colby, Chase, and Crocker, are mere interlopers. They are not *bona fide* claimants of this land.

It is charged in the amended bill that Butler is a mere clerk of Colby. He does not deny this in his answer; and while this does not amount to evidence, it is a suspicious circumstance. Can it be possible that a mere clerk in the office of Colby is able to pay \$300,000 for a tract of land? His answer is evasive, trifling, and it may be doubted whether it was sworn to. No man possessing sufficient intelligence to comprehend his rights would be content to rest his claim to property so valuable upon an answer so trifling and evasive in its character.

Another circumstance will show how fraudulent is the participation of Butler in this scheme. The power of attorney under which Briggs, Hall & Sleeper act was made in November, 1883, and yet Butler, this clerk of one of the men who gave the power of attorney, purchased the land in less than three weeks, at the pretended price of \$300,000, and yet Briggs, Hall & Sleeper say in their answer, acting under this power of attorney, they have sold and leased divers of the lots mentioned in complainant's bill, to sundry and divers parties. Nevertheless, the whole tract is afterwards sold to Silas P. Butler, making no mention in his deed of the sales to "sundry and divers innocent purchasers" in Georgia. Briggs, Hall & Sleeper further say "their action in the premises has been open and above-board,"—"fair, honest, and legal;" and these "fair, honest, and legal representatives" sold these lands twice,—first to innocent purchasers in Georgia, and then to Silas P. Butler. They cannot contend that after Butler's purchase these sales to the Georgia purchasers were made, for they distinctly affirm that they have made no sale since the twenty-sixth of December, 1883, at which time Butler's purchase was completed.

According to their answer, there are more than 50 citizens of Georgia who have bought and leased from Briggs, Hall & Sleeper various lots of these lands. Notwithstanding this fact, the entire tract of 300,000 acres, at one fell swoop, is conveyed to Butler, without any mention in his deeds of the Georgia purchasers. The degree of sincerity, honesty, and legality in the transaction may be easily estimated from this circumstance.

It is insisted, however, by the respondents, that we have no jurisdiction, in a court of equity, to grant the relief prayed for, for the

reason that the complainant has an adequate remedy at law, the suit being in the nature of an action in ejectment. I think the equitable jurisdiction is clearly maintainable. This is not a bill to recover possession of lands, as in an action of ejectment, but it is to prevent fraudulent interference and irreparable injury to the lands and title of the complainant. The authorities relied on by respondents' counsel are not applicable. In the case of *Hipp v. Babin*, 19 How. 271, the title was merely legal. There was no multiplicity of suits; no other special ground of equity jurisdiction; and no particular reason why the court should maintain it. The case in 15 Wall. was to enjoin a suit on a bond on the allegation that the bond was issued without authority. This would have been a complete defense at law. The case in 23 Wall. 466, (*Lewis v. Cocks*,) would expressly justify intervention by equity, where the fraud of the agents or their representatives is so glaring as in this case, it being incontestably true that Colby, Chase, and Crocker bought the lands for the citizens of Maine; who were the incorporators of the Georgia Land & Lumber Company; and paid for it with the money of the company, whatever may be the apparent validity of the title they or their heirs, or those holding and claiming under them, may have. To declare and enforce this trust is within the power of a court of equity. Story, Eq. Jur. 120. Besides, the complainant may appeal to that court to remove a cloud from his title, and to prevent a multiplicity of suits, and the great expense and inconvenience of the litigation necessitated by the multitude of defendants claiming under the same title. *Oelrichs v. Spain*, 15 Wall. 211; *Chastian v. Smith*, 30 Ga. 96; *McKinney v. Burns*, 31 Ga. 295; *Scott v. Taylor*, 64 Ga. 508; *Poulet v. Johnson*, 25 Ga. 403; *Stark v. Starr*, 94 U. S. 477, 485-492.

It is further insisted that complainant must recover on the strength of his own title, and not on the weakness of the title of the respondents. While this is true, it is also true that if the respondents, or the persons under whom they claim, have been guilty of such fraud as would defeat the complainant on his legal title, he may, in a court of equity, on a bill filed against respondents, by suitable proof, supply such defect in his legal title as their fraud has created. His equitable right, with such satisfactory proof of their fraud, then becomes, in contemplation of the court of equity, the legal title.

A conveyance is claimed from Butler, who is the fraudulent reservoir of all the alleged titles flowing from the use which Briggs, Hall & Sleeper have made of the imperfect execution of their trust by Colby, Chase, and Crocker. The admissions of Colby, Chase, and Crocker, and the clear proof of their agency, constitute a sufficient link in the chain of complainant's title, and, in the breast of a court of conscience, this evidence adequately and amply supplies the defects in the written title which are sought to be utilized for the fraudulent purposes of Briggs, Hall & Sleeper, and their confederates.

It is also insisted that the deed to Colby, Chase, and Crocker is

not admissible, because it was not properly registered, and *Beverly v. McBride*, 9 Ga. 443, is cited in support of this objection. Now, the deed in the case before the court is more than 30 years of age, and in the authorities cited the chief justice, in delivering the opinion of the court, uses this language:

"Had this instrument been thirty years old, and testimony adduced that it had been acted upon, or that the obligee took possession of the premises in dispute under it, no proof of its execution would have been required."

In *Hearn v. Smith*, 59 Ga. 704, also cited, the deed was not 30 years old.

In submitting proof of complainant's title the fact was developed that the state of Indiana once owned all of these lands. It was stated in the argument that the Georgia Lumber Company had borrowed money from the old Bank of the United States, and gave the bank a mortgage on these Georgia lands as security for the debt. In the distribution of the assets of the bank on its dissolution, the state of Indiana became the owner of the mortgage, and the Georgia Lumber Company, by deed to that state, discharged the debt, and conveyed to it the title. Whether this account be historically true or not, it matters not. The fact is evident that a conveyance was made of the lands in dispute from the Georgia Lumber Company to the state of Indiana. This conveyance is attacked by respondents on two grounds—*First*, that the deed was not properly executed and proven; *second*, that the state of Indiana is inhibited from holding lands in the state of Georgia.

The technical ground of objection is that the deed had but one witness. He was, however, a commissioner of deeds for the state of Georgia, residing in the state of Indiana. The original deed having been lost, was not offered, but a copy taken from the record, and it was insisted that, there being but one witness, the deed could not be admitted to record. It was an ancient record, and it is true that an ancient record, like an ancient deed, is admitted in evidence without proof. After the lapse of 30 years the law presumes that the official who made the record is dead, and that he cannot be summoned to explain the circumstances under which he made it, and it presumes that everything was done which ought to have been done. If the paper appears to be formally a deed, admitted to record on the attestation of one witness, where two witnesses were required by law, after the lapse of 30 years it will be presumed that there were two witnesses, and that the clerk omitted one. This rule of evidence is enforced *ex necessitate rei*. As in other rules of evidence it is made to further the ascertainment of truth. In this case there is a strong presumption that the deed was never fabricated, and that it was acted upon. It was made to a great state. There is nothing suspicious about it. "An ancient deed, by which is meant one which is more than 30 years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witness

being presumed dead; and if it is found in the proper custody, and is corroborated by ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it is to be presumed that the deed constituted part of the actual transfer of the property therein mentioned; because this is the usual and ordinary course of such transactions among men. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part." 1 Greenl. Ev. 144; *Webb v. Wilcher*, 33 Ga. 565; *Adams v. Roberts*, 2 How. 496; *Patterson v. Winn*, 5 Pet. 233; *Winn v. Patterson*, 9 Pet. 663. The two decisions last cited are pronounced by Mr. Justice Story, and are cases from this circuit.

The deed is corroborated by a resolution of the legislature of Indiana, authorizing the sale of this property by a deed of the governor of Indiana conveying the same. The deed, therefore, constituted part of the actual transfer of the property therein mentioned.

It is said, however, that the state of Indiana cannot own lands in Georgia. The right of a state to hold lands in another state has never been expressly decided. It has been held that the government of the United States cannot accept a legacy to lands in a state, and that such legacy is void. *U. S. v. Fox*, 94 U. S. 315. It is said, and with great show of reason, that it is abnormal, and contrary to public policy, that a state should be permitted to hold lands in another state; and it is also said that a state can own nothing that is not necessary to its existence, and the proper conduct of its affairs.

With regard to the last ground of objection, it can be replied that a state has many of the powers of a private corporation, and I do not see why a state may not buy lands as well as bonds. Most unquestionably is it true that the state of Indiana could not hold lands in the state of Georgia if the state of Georgia objected to it. Our fathers, however, were competent to deal with this question. Their ideas of state sovereignty were even more pronounced than those which now obtain. It is not disclosed by the record that they objected to this effort on the part of a sister state to save what, presumably, was a bad debt. A transaction so enormous as this could not have escaped their attention, and it is scarcely appropriate, I think, in the absence of any action by the state, for Messrs. Briggs, Hall & Sleeper, at this late date, to bring forward the question of its offended sovereignty, especially as it appears that their patriotism, not altogether disinterested in itself, would result in robbing the citizen of another state.

An alien may hold lands in Georgia, and while the comity which exists between the states of our Union will not, in my judgment, legalize the purchase and possession of lands by one state in another state, as a general proposition, still it will permit a state of the Union to authorize or tacitly sanction such a transfer of the title to lands

in its territory to a sister state as will prevent the latter from loss. In order to vitiate the title of the state of Indiana, some proceeding in the nature of "Office found" must have been adopted. It must be understood also that when the state of Indiana bought these lands it came as a subject, and not as a sovereign. It is to be presumed that the state of Indiana got the lands for a legitimate purpose. It is to be further presumed that the state of Georgia would have objected had it seen proper to enforce its political and exclusive rights. If the state of Indiana is to be regarded as an alien, it is laid down in Washburne on Real Property, 74, an alien may purchase and hold lands against all the world except the state; and Briggs, Hall & Sleeper may not say, with Louis XIV., "I am the state."

The title is conveyed from the state of Indiana to Martin R. Green. The deed is signed by the governor, on the authority of a resolution of the legislature of that state; and from Green the chain of title to the complainant is regular and unobjectionable. It is insisted that the deed to George E. Dodge is obnoxious to the act of the legislature of Georgia of 1877 forbidding foreign corporations to hold over 5,000 acres of land in the state. But the deed to Dodge was made before the passage of the act. Besides, this is a question for the state, and it is competent to take care of its own interests. Nobody but the state can raise the question. 3 Washb. Real Prop. 267.

A limited number of the respondents claim title from a different source than Colby, Chase, and Crocker. With regard to these the court can pass no decree. If there be controversy with these parties it can be settled in appropriate proceeding elsewhere.

As against Briggs, Hall & Sleeper; all the heirs of Colby, Chase, and Crocker; against Silas P. Butler, and those who hold under them,—the title of complainant as to these lands is valid, and must be protected, and the prayers of the bill are granted. Let the decree be framed accordingly. No damages have been proven.

SCHEURER *v.* COLUMBIA-STREET BRIDGE Co.

(Circuit Court, D. Oregon. April 19, 1886.)

WATERS AND WATER-COURSES — NAVIGABLE WATERS IN OREGON — POWER OF THE STATE OVER.

Under the ruling in *Cardwell v. Bridge Co.*, 113 U. S. 205, S. C. 5 Sup. Ct. Rep. 423, the provision in the act of congress of February 14, 1859, (11 St. 383.) admitting Oregon into the Union, which declares that "the navigable waters of said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor," does not prevent the state from authorizing the erection of a bridge across the Wallamet river, at Portland, however much it may impede and obstruct the navigation thereof, nor has the United States circuit court any jurisdiction of a suit to enjoin the same.

Suit in Equity for an Injunction.

P. S. Willis, for plaintiff.*George H. Durham*, for defendant.

DEADY, J. This suit is brought to restrain the defendant from erecting a bridge across the Wallamet river, between the foot of Madison street, in Portland, and T street, in East Portland. An application for a provisional injunction was heard on the bill and a general demurrer thereto.

The plaintiff is a riparian owner, whose land has a frontage of 200 feet on the west bank of the Wallamet river, and is situate about 1,000 feet above the site of the proposed bridge; and his complaint is that the erection of the bridge will so obstruct and hinder the navigation of the river as to prevent vessels engaged in the commerce of this port from, at least with safety and convenience, reaching his property. The bill states that the river at the site of the proposed bridge is about 1,475 feet wide, with a ship channel of about 400 feet in width, and that the bridge will consist of six solid spans of 200 feet each in length, resting on piers built in the river, and one section 270 feet long, resting on a draw pier as a pivot, which, when turned parallel with the stream, will give a passage-way of 120 feet in width on either side of said pivot pier; that the distance from the lower chord of the span is only eight feet above high-water mark; and the construction of the proposed bridge will obstruct and impede the navigation of the river, and the use of the harbor of Portland, which extends from the lower end of the city southward a distance of about three miles, and for a half mile above the plaintiff's property.

The defendant claims the right to build a bridge under an act of the legislature of the state, passed February 26, 1885, (Sess. Laws, 472,) as amended by the act of November 24, 1885, (Sp. Sess. Laws, 14;) but the plaintiff alleges that the same is void or inoperative, as being in conflict with the act of congress passed February 14, 1859, (11 St. 383,) for the admission of Oregon into the Union, wherein it is provided that "all the navigable waters of the state shall be common highways, and forever free, as well to the inhabitants of said state as to all the other citizens of the United States, without any tax, duty, impost, or toll therefor."

The questions arising on this demurrer were considered by this court in *Hatch v. Wallamet Iron Bridge Co.*, 7 Sawy. 127, S. C. 6 Fed. Rep. 326, and again in *Wallamet Bridge Co. v. Hatch*, 9 Sawy. 643, S. C. 19 Fed. Rep. 347, where it was held that, by the act of 1859, congress, in the exercise of its power to regulate commerce between the several states, had declared the Wallamet river, as a means of said commerce, "a common highway," and therefore the state of Oregon could not authorize any one to build a bridge across the same which, the circumstances considered, would needlessly impede or obstruct the navigation thereof; and that the question of what constitutes such impediment or obstruction arises under said act of con-

gress, and therefore this court has jurisdiction of a suit involving the same. The doctrine of this case was followed in the opinion of the court in *Cardwell v. American River Bridge Co.*, 9 Sawy. 662; S. C. 19 Fed. Rep. 562; but on an appeal to the supreme court it was held (113 U. S. 205, and 5 Sup. Ct. Rep. 423) that the provision in the act admitting California into the Union concerning the navigable waters therein, which is similar to that in the one admitting Oregon, does not of itself deprive the state of the power possessed by other states to authorize the erection of bridges over navigable waters therein; and that the provision is only intended to prevent the use of navigable streams by private parties, to the exclusion of the public, and the exaction of tolls for their navigation.

The proposed bridge at the foot of Madison street is five blocks, or about 1,300 feet, further south than the one in *Hatch's Case*, and is otherwise much less objectionable, the opening at the draw being 120 feet in the clear instead of only 100. But it matters not what is the character of the bridge, or how much of an obstruction it will be to navigation, if the state authorizes it, and the United States has passed no law on the subject of impediments and obstructions to the navigation of the river, this court has no jurisdiction to prevent the erection of the same. The *Hatch Case* is now pending in the supreme court on appeal, and may be decided at this term, but it is not probable that any modification of the ruling in the *Cardwell Case* will be made; and if congress has no power to pass an act to prevent the obstruction of the navigable waters of the state by the erection of solid bridges or otherwise, unless the same applies to the navigable waters of all the states, as the argument in that case seems to imply, then it is not apparent how the provisions in the acts relating to the admission of Oregon and California are valid, even as against a claim under the state to the exclusive use of any of the navigable waters therein, or to the exaction of tolls for the navigation thereof. Certainly, congress has as much right to legislate against physical obstructions being made to the navigation of the waters in a state, in detail and specially, as to prevent their exclusive use by any one, or the exaction of tolls for the same in that way.

But admitting the power in congress to legislate specially on this subject, the court in the *Cardwell Case* went so far as to hold that, notwithstanding the act of congress in effect declares the American river a common highway, forever free "to the citizens of the United States, the state of California may authorize the erection of a low, solid bridge across it, which prevents it from being used as a highway by any one. The act, says the court, has but one object, namely, "to insure a highway open to all, without preference to any." But I respectfully submit that on this interpretation of the act a better definition of its purpose would be: "It intends to secure an open highway to all or to none, as the state may judge expedient."

But whatever my judgment in the premises may be, this construc-

tion of the legislation by congress is binding on this court, and therefore I must refuse this injunction, and sustain the demurrer to the bill, and dismiss it; and it is so ordered.

CENTRAL TRUST Co. and another v. WABASH, ST. L. & P. RY. Co.
(HAMILTON, Intervenor.)¹

(Circuit Court, E. D. Missouri. April 2, 1886.)

EQUITY PRACTICE—INTERVENING JUDGMENT CREDITORS.

Where a small judgment creditor of a railroad, whose judgment was recovered before the appointment of a receiver, and who lives at a distance from the place where court is held, intervenes in a foreclosure suit against the road, he should be given the fullest opportunity of a hearing, and technical rules should not be enforced against him.

In Equity. Motion to set aside order confirming report of master on intervening petition of George Hamilton.

James Carr, for intervenor.

Wells H. Blodgett, for receiver.

BREWER, J., (*orally*.) In the intervention of George Hamilton in the *Wabash Case*, it appears that a year ago a petition of intervention was filed, which was referred to the master, and by him reported upon. The intervention was on account of a judgment against the Wabash road, in one of the outlying counties, a short time before the appointment of the receivers. The petition was filed by counsel living in such county. Upon the filing of the master's report, which was adverse to the claim, the matter passed along without action until the fifteenth of March of the present year, when, through new counsel, without leave of the court, an amended petition of intervention was filed. Four days thereafter the report of the master was confirmed. Now, a motion is made to set aside that order of confirmation, and refer the matter back to the master. Upon the hearing of this motion there was little or no discussion as to whether, under the amended petition, the petitioner would have any lien upon the *corpus* of the property prior to the lien of the mortgages, or even upon the earnings of the road; and I express no opinion as to whether he would have any claim based upon the facts as stated in his amended petition.

I have no question but that, technically, he is entitled to no further hearing in this court. He neglected to file any exceptions to the master's report; and yet it must be remembered that this claim

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

comes from an outlying county, which had been placed in judgment before the court through its receivers took possession of this large property; and the court, dealing equitably with such interests as that, ought to give to every one, especially to those holding small claims, and living at a distance, the fullest opportunity of a hearing, and not rigidly enforce technical rules against them. So it seems to me that it would be fair to make an order like this: that upon the payment of all the costs which have accrued in this intervention since the filing of the original petition, the order of confirmation be set aside, and leave given to file the amended petition, and the whole matter referred back to the master; and it will be so ordered.

BLAIR v. St. Louis, H. & K. R. Co.¹

(Circuit Court, E. D. Missouri. April 2, 1886.)

1. RAILROADS—MORTGAGES—CROSS-BILL—PRIOR EQUITY—NOTICE.

Where, in a foreclosure suit, a cross-bill is filed by a judgment creditor, insisting that though he has a junior title of record he has a prior equity, he must allege all facts tending to show that the mortgagee had notice; and where he fails to do so, and simply charges notice, it is sufficient for the mortgagee to deny notice, without going into particulars.

2. SAME—NOTICE.

Where a person finds a corporation, organized under the laws of the state, in possession of a railroad partially or fully completed, he is justified in assuming that the company in possession is the only one that ever was in possession, or that ever did any work thereon, or had any rights thereto, unless the record shows something to the contrary.

In Equity. Cross-bill of Josiah Fogg. Petition for rehearing. For report of previous opinion, see 25 Fed. Rep. 684.

Theodore G. Case, for complainant.

James Carr and *Geo. D. Reynolds*, for Fogg.

BREWER, J., (orally.) In the case of *Dewitt C. Blair v. Josiah Fogg* a petition for rehearing was argued the other day, counsel claiming that there were two or three matters which the court did not consider—which, indeed, were not suggested to the court—and which justified a different conclusion. Mr. Fogg had, away back in 1870, a good claim against the St. Louis & Keokuk Railroad. That company, organized under a special charter, and having done some work, transferred all its property to the St. Louis, Hannibal & Keokuk Railroad, a company organized under the General Statutes. In the instrument making the transfer, there was a stipulation that the new company should assume and pay debts to the amount of \$19,000, which it is conceded covered the claim of Mr. Fogg. That in-

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

strument of transfer was never recorded. The new company finished the road, placed its mortgage upon the property, which mortgage was foreclosed in this suit. After years had passed Mr. Fogg commenced an action at law against the St. Louis & Keokuk Railroad Company, and obtained judgment. He followed that by a proceeding in equity against the St. Louis, Hannibal & Keokuk Company, and obtained a decree, charging this judgment against the new company. He now claims that this judgment is a lien prior to the mortgage, and counsel in the argument before me, on the petition for rehearing, contended that the old company, under its charter, had no power to transfer; that the new company took the property subject to the debts of the old; and that the creditors of the old company can follow that property wherever they find it. All that, or at least the substance of it, was adjudicated when the decree passed against the St. Louis, Hannibal & Keokuk Railroad. Then, he contends that the conditions of the transfer which were shown in the conveyance, although not of record, were conditions which every purchaser from the St. Louis, Hannibal & Keokuk Railroad Company was bound to take notice of. There is not a syllable of testimony showing that there was ever of record anything indicating that the St. Louis & Keokuk Company had done a particle of work, obtained title to a foot of ground for right of way, or other purposes, or had anything to do with the building of the road. All that the record shows is that the St. Louis, Hannibal & Keokuk Company, a corporation organized under the general law of the state, was, at the time of the mortgage, in possession of a road partially completed. Now, I do not understand that a party is bound to take notice of matters which are simply floating,—resting in parol. It is a common thing for more than one corporation to be organized for the construction of roads between the same *termini*. There are to-day two roads running between here and Kansas City, and I believe it is true there are two or three more corporations organized with a view to the construction of other roads between the same *termini*. If a party finds a corporation organized under the law of the state, in the possession of a railroad partially or fully completed, he is not bound to assume that there may be some other corporation, having like powers, which, prior thereto, was in possession or had rights therein. Unless the record in some way notifies him of the title of that other corporation, he is justified in assuming that the company in possession is the only company that ever was in possession, or that ever had done any work thereon, or had any rights thereto; and that is the record in this case.

The other proposition of counsel is that, by the equity rules of pleading, Mr. Fogg was entitled to a decree. He claims that Mr. Blair in his answer only denied notice, and that that was not sufficient. When he claimed to be an innocent purchaser for value, without notice, he should have stated in his answer the mortgage, its date, the purpose, the contents, and the consideration paid; that the consider-

ation was paid in good faith, and when it was paid. As he was specially charged with notice, he should deny the circumstances from which notice could be inferred. I do not so understand the rules of equity pleading. Prior record title was in the mortgagee. Mr. Fogg comes in by his cross-bill and insists that though he has a junior title of record he has a prior equity. Now, under those circumstances, it seems to me that it is for him to allege all the facts tending to show that the party having the prior legal title had notice, etc., and when he has done this, it is sufficient in the answer to deny, and not necessary to go further, and specifically allege all the matters above stated. These being the only grounds, I am compelled to overrule the petition for rehearing.

CENTRAL TRUST CO. *v.* TEXAS & ST. L. RY. CO. (BORDEN and another,
Intervenor.)¹

(Circuit Court, E. D. Missouri. April 2, 1886.)

1. RAILROADS—LIENS FOR MATERIALS—SECTION 3200, REV. ST. MO., CONSTRUED.

Where articles are furnished a railroad company which do not pass into the structure of its road, they are not "materials," within the meaning of section 3200 of the Revised Statutes of Missouri, and parties furnishing them are not entitled to any statutory lien on the road therefor.

2. SAME—MORTGAGES—MATERIAL-MEN—EQUITABLE LIENS.

A creditor of a railroad company whose claim arose out of the sale of personal property to the company claimed, after the road was placed in a receiver's hands in a foreclosure suit, that he was entitled to a lien on the road prior to that of mortgage creditors for the whole amount due him, because, under the laws of the state, if the property had not been placed in a receiver's hands he could have seized and sold it under execution. *Held*, that he is only entitled to a lien for the present value of the property sold to the company.

In Equity. Exceptions to master's report.

The facts concerning the intervenor's claim are sufficiently stated in the opinion of the court. The order of the court referred to below is to the effect that all persons who furnished the railroad company with necessary supplies within six months prior to the appointment of the receiver shall be allowed a lien prior in right to that of mortgage creditors. Default in the payment of interest took place September 1, 1883. A receiver was appointed January 12, 1884.

Charles G. B. Drummond, for intervenor.

Phillips & Stewart, for receiver.

BREWER, J., (*orally*.) In the *Texas & St. Louis Railway Case*, intervening petition by Borden, Sellick & Co., the claim was referred to

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

the master, by him reported, and exceptions to his report were presented. The claim amounted to \$2,205.75. It was for scales, trucks, letter-presses, and things of that kind, which were sold and delivered to the road during the period between August 1, 1882, and January 4, 1884. The master reported in favor of the entire amount as a general claim against the road, and gave a lien prior to the lien of the mortgagees for \$1,541.60, the price of the goods delivered after September 1, 1883; but declined to award a lien for the balance, \$654.15, which was sold and delivered between August 1, 1882, and September 1, 1883, holding that it did not come within the orders of the court respecting claims for materials furnished; and the question now presented is whether the master erred in rejecting the claim for a prior lien for that balance.

Two questions are presented.

First. It is claimed that the goods thus delivered were lienable goods, and that under the railroad lien law of your state, although the goods, the trucks, scales, and letter-presses did not pass into the structure, yet, as they became a part of the permanent equipment, they were within the scope of that act. The only difference of moment between the railroad lien law and the general mechanic's lien law is that in the former the word "fuel" is used, giving to those who sell fuel, as well as to those who do labor and furnish materials, a lien. Of course, fuel does not pass into the structure of the road, and, by reason of the use of that word "fuel," it is claimed that the intent of the legislature was to enlarge the scope of the word "material," and make it include anything and everything which passed, not merely into the structure, but into the permanent equipment.

In the intervention of the Waters-Pierce Oil Company, in this same case of *Central Trust Co. v. Texas & St. L. R. Co.*, reported in 23 Fed. Rep. 703, we examined that statute, and were of the opinion that such was not a fair construction; that although "fuel" was named in the statute as a matter in respect to which a lien might be claimed, yet it was not the intent of the legislature, by the use of that word, to enlarge the scope of the word "material," as used in ordinary lien laws. It is true that oil does not pass into the permanent equipment, but is a matter for daily consumption; and counsel seek to distinguish this case from that, in that these matters pass into the permanent equipment. I do not think there is any reason to depart from the construction we then placed upon the statute, and must hold that the word "material" in the railroad lien law has no broader or other significance than in ordinary lien laws, and in them it is unquestioned that it includes only those things which pass into the permanent structure.

Second. The other question is this: These articles were articles of personal property that passed into the permanent equipment. Section 16 of article 12 of your constitution provides that the rolling stock, and all other movable property, of railroads shall be consid-

ered personal property. Section 2353 of the Revised Statutes provides that personal property shall, in all cases, be subject to execution upon judgment against the purchasers for the purchase price, and shall not be exempt except in the hands of *bona fide* purchasers for value; and the argument which is made by counsel is very plausibly and forcibly put: That this personal property passed into the hands of the railroad company. It did not pass into the structure, but remained personal property. But for the action of this court in taking possession by its receivers, it could have been seized and sold on execution upon judgment rendered for this claim against the railroad company; and that as the court, by its action in seizing the property, has intercepted that remedy, equitably, it should now order payment out of the assets.

Whatever force there might be to that proposition in some cases, I think here it is not applicable. All that could be claimed under those provisions, giving them full force, is that the specific property which passed into the hands of the railroad company should be liable to seizure and sale. For instance, if a locomotive was sold, that specific locomotive might be seized and sold in satisfaction of a judgment for the price, but no other personal property could also, by virtue of these provisions, be seized and sold. Now, the testimony fails to show that this specific personal property remained in possession of the railroad company, and passed into the hands of the receiver. All that the testimony discloses is that whatever personal property the company then had did pass into the hands of the receiver. This property, as against which the master refused a lien, was sold and delivered months before. Knowing well the hard usage—the wear and tear—which such property in the hands of a railroad company receives, can it be said that we are to presume that all that property remained in existence, and all of it passed into the hands of a receiver? Further, property which is once used deteriorates in value; and, subjected to the hard usage which such property would receive in railroad use, would largely and rapidly deteriorate. If we look upon this as a claim for the entire \$2,200, is it not fair to say that the value of the property remaining in the hands of the company, if it did remain, was not in excess of this \$1,541 which was allowed as a prior lien? Would it be just to the other claimants—to others having secured liens or equitable liens—to give to this party, out of the assets of the company, full payment for their entire claim, as though that property still remained in the hands of the company in its original perfect condition, unworn and not deteriorated in value? I think not.

It seems to me that all that equitably could be claimed, giving full force to the argument which counsel have made, is to sustain the award of a lien for over two-thirds, as has been given by the master; and that the exceptions to the report of the master should be overruled, and the report confirmed.

CHAMBERLAIN v. CHICAGO, B. & Q. R. Co.¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

STATUTE OF LIMITATIONS — MISREPRESENTATIONS BY PHYSICIAN AS TO EXTENT OF INJURY.

Where a person through whose negligence another has suffered an injury, places the injured party in the care of a doctor who has previously been the physician of both, and the physician misleads his patient as to the extent of his injuries by false and fraudulent misrepresentations, such misrepresentations will not prevent the statute of limitations from running.

At Law. Demurrer to petition.

A. A. Paxson and A. R. Taylor, for plaintiff.

H. H. Trimble, for defendant.

BREWER, J., (*orally*.) In the case of *Chamberlain against The Chicago, Burlington & Quincy Railroad Company* there is a demurrer to the petition. The petition alleges that the defendant is a resident of the state of Illinois; that in 1875 the plaintiff was injured while a passenger on one of its trains. This suit was brought in 1885, more than 10 years after the injury. The Missouri statute of limitations is five years. *Prima facie* it is a bar. Of course, generally, the *lex fori* controls as to matters of limitation. There are two exceptions named in the statute: One, "if the defendant be out of this state before, or depart after, the cause of action commences," (section 3236;) but that applies only when the defendant is a resident of the state. "If at any time, when any cause of action herein specified accrues against any person who is a *resident* of this state, and he is absent therefrom,"—clearly that does not apply. The other provision is: "If any person, by absconding or concealing himself, or by any other improper act, prevents the commencement of an action." It is alleged in the petition, to bring the case within that exception, that the defendant put the plaintiff, after the injury, under the care of one Dr. Ransom, its physician and surgeon, who was also the physician, or had been prior thereto, of the plaintiff; and that Dr. Ransom represented to him falsely and fraudulently that the injuries from which he was suffering did not result from that accident, but from syphilis; and that he was not aware for eight years, and until about two years prior to the commencement of this action, that these injuries from which he was suffering resulted from the accident.

The petition alleges that the car was thrown from the track, and that the plaintiff was rendered unconscious, and that when he became conscious he was either crawling out or being helped out of the car by some parties present, and that his bowels were black and blue. Then he goes on stating the character of his injuries. From that time the natural action of his bowels ceased, and he has suffered an-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

noyances and pain; and that, in consequence of the non-action of his bowels, epilepsy has set in, and his mind is giving way. Now, on the face of it, it appears that he was hurt, and knew it; that he was injured, and was conscious of it; and all that can be said is that these representations, falsely and fraudulently made by the doctor, were as to the extent of the injury which he had sustained. That does not bring the case within the statute. There was nothing in that to prevent the commencement of the action. All that can be said is that the representations of the doctor misled him as to the extent of the injury he suffered, not as to the fact that he had a cause of action, or had suffered injuries. Further, it is not alleged that the defendant employed the doctor to make any such false statement. It is true, it is charged that the doctor was a physician and surgeon of the defendant; but it is also alleged that he was the confidential physician of the plaintiff prior to the accident, and continued to so act thereafter. Even if true, as it is alleged, that he "falsely and fraudulently," and with all of the other adjectives that are commonly applied, made these representations, yet nowhere is it stated that he was employed or authorized by the defendant to make any such statements, or that the company knew he had made them. Under these circumstances, can it be said that the defendant, by any improper act, prevented the commencement of the action?

I think the demurrer must be sustained; and, it being one of those things which cannot be remedied, judgment will be entered for the defendant.

WOODWARD v. GOULD.¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

1. ASSUMPSIT—PLEADING—PRESUMPTION AS TO WHETHER CONTRACT SUED ON IS ORAL OR WRITTEN.

Where, in a suit for breach of contract, the petition fails to state whether the contract was oral or written, and no contract is filed, it will be presumed to have been oral.

2. SAME—WHAT PETITION SHOULD STATE.

In a suit for breach of contract the petition should state clearly what was to be done, agreed what has been done, and what has been omitted.

At Law. Suit for damages for breach of contract. Motion to make petition more definite and certain.

The petition states, in substance, that on January 7, 1882, the defendant and plaintiff entered into an agreement, whereby the latter agreed to organize, and aid in the organization of, "a railroad company to construct and operate a railroad between the town of Pacific, in this state, and the city of St. Louis," and to act as secretary of

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

said company for a period of three years from its organization, at a salary of \$5,000 per annum; and that he also agreed to impart "certain information of law and fact affecting the charter rights and privileges of a certain railroad company, named in said undertaking," of which he was possessed; that in consideration of the premises the defendant agreed to advance all money which it should be necessary to expend in locating said road, and organizing said company, and to allow plaintiff for his services 45 per cent. of the capital stock of the company when organized, and not to use said information for any purpose if the contract were not carried out. The petition further states that the plaintiff imparted said information as he had agreed to, and in conformity with the agreement took necessary steps to the organization of said company, and performed labor and services necessary to the location of the proposed line of said road, the expenses of which were defrayed by defendant, and was ready to perform his part of said agreement; but that the defendant refused to carry out or perform the agreement, and has ever since refused to carry it out, and in violation of said agreement has made use of said information.

Krum & Jonas, for plaintiff.

Thos. J. Portis and Bennett Pike, for defendant.

TREAT, J. As to the first and second points, it suffices that if the alleged contract was in writing, not averred, and contract filed, the statute provides for the result. It must be taken for granted that the contract was oral. The contract is not clearly stated as to the road or enterprise, or what was done or omitted to be done. Motion sustained.

TURNER v. SHACKMAN.¹

(Circuit Court, E. D. Missouri. March 29, 1886.)

1. DEPOSITIONS—DEDIMUS POTESTATEM—SECTION 866, REV. ST.—STATE STATUTES.

A "common usage," within the meaning of section 866, Rev. St., cannot be established by a state statute.

2. SAME—DEPOSITIONS DE BENE ESSE.

A *dedimus potestatem* will not be granted to take testimony which can be taken by deposition *de bene esse*.

3. SAME—DEPOSITION OF DEFENDANT.

Section 866, Rev. St., does not authorize the granting of a *dedimus potestatem* to take the deposition of a defendant, where the only object appears to be to ascertain what he will swear to before placing him on the witness stand in court, especially where no answer has been filed, and the answer is not yet due.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

At Law. Motion for *dedimus*.

J. C. Normile, for plaintiff.

Z. G. Mitchell, for defendant.

BREWER, J., (*orally*.) In this case application was made for a *dedimus* to take the testimony of a witness about to leave this jurisdiction, and also the testimony of the defendant. So far as the testimony of the witness about to leave the jurisdiction is concerned, that can be taken by deposition *de bene esse*. As far as the testimony of the defendant is concerned, the application comes within the late decision of *Ex parte Fisk*, 113 U. S. 713, S. C. 5 Sup. Ct. Rep. 724, in which it is held that the deposition of a party cannot be taken unless it comes within the exceptions named in the federal statutes. Counsel cited to us an opinion by Judge McCRAW, in which he interprets the words "common usage" to mean the usage prevalent in the state; but Judge MILLER in writing his opinion very emphatically says "it is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of the opposing counsel to extract something which he may then use or not as suits his purpose. This is a very *special* usage, dependent wholly upon the New York statute." I do not think the showing made is sufficient to bring the case within the provision "that when it is necessary to prevent a failure or delay of justice any courts of the United States may grant a *dedimus*;" for while plaintiff alleges in his affidavit that it is necessary to take the deposition of the defendant in order that he may set out specific matters of account which should have been kept on the defendant's books, and which have not been, yet his petition is accompanied by an exhibit in which is a full, itemized account, of some ten or a dozen pages, giving dollars and cents, pounds and fractions thereof, etc. Evidently, this is an effort to see what the defendant will testify to before he is put upon the witness stand in presence of the jury.

The motion for *dedimus* will be overruled.

Brother TREAT adds a suggestion which is very pertinent in this case. The petition has just been filed; no answer has been filed or is due; and no one can tell in advance whether any testimony will be needed. *Non constat* but that the defendant may admit all that is claimed in the petition.

DANZIG and others v. GUMERSELL and others.¹

(Circuit Court, E. D. Missouri. March 31, 1886.)

1. COMPOSITION WITH CREDITOR—FAILURE TO COMPLY WITH TERMS.

Where, by the terms of a composition agreement, the creditors agree to accept notes indorsed by a particular person, and that person dies, they are not bound to accept any other indorser.

2. SAME—ESTOPPEL.

Where, in such a case, the debtor wrote to his creditors notifying them of the death of the proposed indorser, and suggesting B. as a substitute, and closed his letter as follows: "Should you deem his indorsement sufficient, please advise me promptly:" *held*, that a creditor who did not signify his intention until notes indorsed by B. had been accepted by the other creditors, was not bound to accept such notes, and, having refused to do so, is at liberty to sue on his original cause of action.

At Law.

E. Cunningham, Jr., for plaintiffs.

George M. Stewart, for defendants.

BREWER, J., (*orally*.) In the case of *Danzig and others* against *Gumersell and others*, an action on three notes, the defense is a composition agreement, signed by the creditors of Gumersell. The facts are these: The defendants, merchants in this city, becoming embarrassed, arrangements were entered into for a composition and a discharge upon giving notes to the amount of 50 per cent.; and an agreement was prepared and signed by substantially all, if not all, the creditors, which agreement was that the creditors would take five notes, amounting to 50 per cent. of their debts, payable in 3, 6, 9, 12, and 15 months, indorsed by Turnbull & Gumersell, of Newark, New Jersey. Plaintiffs signed that composition agreement. After it was signed, Gumersell, of the firm of Turnbull & Gumersell, died. That was on the ninth of March. On the same day a circular letter was sent to all of the creditors, announcing the fact of the death, and proposing that Alexander Turnbull, who belonged to the firm of Turnbull & Gumersell, should indorse in place of Turnbull & Gumersell. After referring to some parties from whom information could be obtained as to the financial responsibility of Mr. Turnbull, the letter closed with these words: "Should you deem his indorsement sufficient, please advise me promptly." That letter was mailed to all the creditors on the ninth of March. The plaintiffs made no reply. On the nineteenth or twentieth of March, notes were prepared and indorsed by Alexander Turnbull for all of the debts. They were presented to one and another of the creditors, and by them accepted. They were presented to the plaintiffs, and by them declined, and thereafter this action was brought on the original notes of Gumersell & Bro.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

It is claimed that there was a composition agreement executed, which, of course, would bar an action on these notes. If not executed, the conduct of the plaintiffs, it is claimed, was such as to estop them from denying the composition agreement; and, if true, that would be a bar; for it is well settled that a creditor, although not formally putting his name to a composition agreement, may sometimes, by his conduct inducing other creditors to enter into the composition, be estopped from denying that he himself is a party to it.

Was there a composition agreement executed? The agreement which was signed was to accept the notes of the defendant indorsed by Turnbull & Gumersell. No such notes were ever prepared or presented, and, indeed, could not be, Mr. Gumersell having died. The written agreement was therefore never carried into effect. Plaintiffs, when the notes indorsed by Alexander Turnbull were presented, declined to accept. They thereafter, neither by the written agreement nor by any parol acceptance, executed any composition agreement.

Was their conduct such as to estop them? Of course, as I said, if a creditor induces other creditors to sign a composition agreement upon the faith that he is a party to it, or that he will become a party to it, he may be estopped thereafter to deny that he is a party to it, for it would be a fraud upon the other creditors, who have relied upon his actions. But is there any conduct on the part of the plaintiffs to estop them? They signed the agreement that failed. It was no fault of theirs. They never, by word or act, indicated to any party, creditor or debtor, that they would take notes indorsed by Alexander Turnbull alone. The letter which was sent to them closes as I said,—"Should you deem his indorsement sufficient, please advise me promptly." No answer was returned to this. Silence implied a denial, for if they deemed his indorsement sufficient they were to answer, and not answering implied it was not sufficient. The case might be different if the tenor of the letter had been different. If the inquiry had been, "If you deem this insufficient, please advise promptly," and they had not answered, there might then be a basis for saying that the parties were misled, relying on the silence as an assent to the sufficiency of the proposed new indorsement. It seems to me, therefore, it cannot be held that there was ever a composition agreement in fact, or that plaintiffs in any way conducted themselves so as to estop them from denying any agreement, or from a recovery upon the original notes, and judgment will be so ordered.

In re BALDWIN.

(Circuit Court, D. California. March 31, 1886.)

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS OF STATE —
CONSPIRACY TO DRIVE OUT CHINESE.

Rev. St. § 5519, so far as it embraces a conspiracy to deprive Chinese residents of a state of the privileges and immunities secured to them by existing treaties, is constitutional. Per SAWYER, C. J., SABIN, D. J., dissenting.

On Habeas Corpus.

A. L. Hart, for petitioner.

Hall McAllister and J. W. Armstrong, for respondent.

Before SAWYER and SABIN, JJ.

SAWYER, C. J. The petitioner is in the custody of the marshal of this district, under a warrant issued by a United States commissioner, upon a charge of conspiracy with a number of other persons named, to deprive certain Chinese residents of the town of Nicolaus, but not citizens of the United States, of their right to reside, and pursue their lawful vocations, in said town, and of actually depriving them of such right by forcibly expelling them from their homes, and from the town, in pursuance of said conspiracy; thereby depriving them of their rights and privileges under the laws, and of the equal protection of the laws, guaranteed to them under our treaty with China. The charge is apparently founded upon section 5519 of the Revised Statutes of the United States, which, so far as applicable to this case, provides that "if two or more persons in any state or territory conspire * * * for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, * * * each of such persons shall be punished by a fine of not less than five hundred dollars, or more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months, nor more than six years, or by both such fine and imprisonment."

It seems to me that there can be no doubt that the acts charged are within the provisions of this section, and if the provisions, so far as they embrace Chinese aliens,—subjects of the emperor of China,—are constitutional and valid, that they constitute a very grave offense against the United States. So far as the provisions relate to the territories over which the United States have exclusive legislative power, there can be little doubt that the act is valid. *National Bank v. Yankton*, 101 U. S. 129, 133. If invalid so far as the state is concerned, the provision as to the territories is easily severable, and it will be upheld so far to be valid. *Packet Co. v. Keokuk*, 95 U. S. 80, 89; *Presser v. Illinois*, 6 Sup. Ct. Rep. 583. But in *U. S. v. Harris*, 106 U. S. 629, S. C. 1 Sup. Ct. Rep. 601, this provision was held to be unconstitutional and void, so far as it applies to citizens

of the United States within a state. If that decision is applicable to the facts of this case, of course it is controlling, and the petitioner is unlawfully held, and must be discharged.

But the *Case of Harris* depended solely upon the fourteenth amendment, which was held to be aimed only at state action, and did not apply to unlawful combinations of individual citizens against other citizens, acting wholly without color of law or authority of the state. On that ground alone it was held to be unconstitutional; the provisions authorizing appropriate legislation to enforce the amendment extending no further than to protect the rights expressly provided for in the amendment. In this case, however, the Chinese aliens against whom the conspiracy is aimed do not rely upon the fourteenth amendment alone, or at all, except so far as the right to enjoy all the privileges and immunities of citizens, and the equal protection of the laws, is implied from its provisions recognizing the rights by protecting them from hostile state legislation, upon the principles adopted in *Ex parte Yarbrough*, 110 U. S. 652, 664, 665, S. C. 4 Sup. Ct. Rep. 152, and *U. S. v. Waddell*, 112 U. S. 76, 80, S. C. 5 Sup. Ct. Rep. 35. They rely mainly upon other express provisions of the constitution. Article 6 of the national constitution provides that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution, or laws of any state, to the contrary notwithstanding;" article 1, § 10, "that no state shall enter into any treaty, alliance, or confederation;" article 2, § 2, that the president "shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur;" and the last clause of section 8, art. 1, that congress "shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Thus, the states have surrendered the treaty-making power to the general government, and vested it exclusively in the president and senate; and when duly exercised by the president and senate the treaty resulting becomes the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated. As to what subjects are within the treaty-making power, see *Parrott's Case*, 6 Sawy. 368, 369, S. C. 1 Fed. Rep. 481, and the numerous cases there cited. It certainly, under the authorities there cited, embraces the entire subject-matter of our treaties with China. The rights, privileges, and immunities guaranteed are within the treaty-making power to grant. They are created under, and are dependent upon, the constitution of the United States. And in *U. S. v. Reese* the supreme court holds that "rights and immunities created

by, or dependent upon, the constitution of the United States can be protected by congress. The form and manner of protection may be such as congress, in the legitimate exercise of legislative power, shall provide. This may be varied to meet the necessity of the particular right to be protected." 92 U. S. 217. And in *Yarbrough's Case* the supreme court says: "The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of these cases it is the duty of the government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing." 110 U. S. 658, and 112 U. S. 80; 4 Sup. Ct. Rep. 152, and 5 Sup. Ct. Rep. 35.

There is nothing in the suggestion of counsel that the Chinese, on this principle, are better off than citizens. It is presumed that the state will protect its own citizens, while long experience shows that it will not always protect foreigners against the prejudices and hatred of citizens. But whether the suggestion be true or not cannot affect the question; for the state has not, in this particular, surrendered the power of protecting its own citizens among themselves to the United States. It has, however, surrendered its power over the intercourse of its citizens with foreign nations to the national government. The relations between the United States and foreign governments are matters of international and not mere state concern. The power to make treaties, and to grant rights within the state to aliens under treaties, necessarily involves the power to protect those rights when granted, either against the acts of the states or the citizens of the several states. Without this power of protecting the rights granted to aliens by treaty against hostile local prejudices, the power to grant such rights would be utterly futile and nugatory. Every right must have its remedy, or it is practically no right. The power to grant, without the power to protect, would be but in name without the substance. It is necessary for the national government to be empowered to execute its own laws, and especially its treaty stipulations with other nations. Without this power it would be impossible to avoid giving good cause for wars. Hence the power to protect the rights granted under treaties, as correlative to the power to grant, was fully vested in congress by the constitution. If this puts the Chinaman, as is said, in a better position than the citizen, so be it. But the state has surrendered that power to the general government in the one case, while it has not done so in the other. It might as well be said that the alien Chinese, or other nationality, is better off than the citizen because the former can always sue a citizen in the national courts while the latter cannot. There can be no doubt that making the violation of any rights so secured by the constitution and treaties "made under the authority of the United States" by a combination of individuals a criminal offense against the nation, and punishable as such, as is provided by section 5519, is a proper mode of protection.

Such combinations to violate treaty rights are matters, not merely of state, but international, concern, and may well involve questions of peace and war. By article 5 of the treaty called the "Burlingame Treaty," "the United States and the emperor cordially recognize the *inherent and inalienable right* of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of *trade or as permanent residents*." And article 6 further secures to Chinese residents "all privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nation." 16 St. 740. The amended treaty of 1880 adds the still more comprehensive word "*rights*" to the words "privileges, immunities, and exemptions," and expressly provides that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord." And article 3 of the latter is as follows:

"If Chinese laborers, or Chinese of any other class, now either *permanently or temporarily* residing in the territory of the United States, meet with ill treatment *at the hands of any other persons*, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same *rights*, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 St. 827.

Our treaty with Great Britain, still in force, will disclose what some of the rights so secured to the Chinese by these treaties are. It provides that "the inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers in the territories aforesaid [of the United States and Great Britain, in Europe] to which other foreigners are permitted to come, to enter into the same, and *to remain and reside in any parts of the said territories, respectively*." Pub. Treaties, 293, 299, 312.

Thus, the United States government has, by these treaties, made in pursuance of the constitution and under the authority of the United States, imposed upon itself the express obligation "to exert all its power to devise means for their [Chinese residents] protection," and to secure them the "*rights, privileges, immunities, and exemptions*," to which they are entitled where such Chinese residents meet with ill treatment *at the hands of any other persons*," as well as in consequence of unfriendly legislation by the states. This right is not limited to state action, as the fourteenth amendment was held to be limited; but it is expressly extended to individual acts. Among those rights is the right to select a place for *temporary or permanent residence*, and to reside and pursue their lawful vocations at the places so selected. As to what the privileges and immunities secured are, see *Parrott's Case*, 6 Sawy. 373, S. C. 1 Fed. Rep. 481, and cases cited, and *People v. Marx*, 99 N. Y. 386, S. C. 2 N. E. Rep. 29.

Proper means for protecting these rights certainly include the enacting of criminal laws for enforcing, protecting, and securing the rights guarantied by the treaties made in pursuance of the provisions of the constitution cited.

These Chinese residents of Nicolaus, therefore, had rights arising under, and dependent upon, the constitution of the United States, and the treaties made in pursuance thereof between the United States and the emperor of China, which were violated by the acts charged upon which the arrest was made; and rights which it was competent for congress to protect by legislation in a proper form, under the clause cited, which authorizes it "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States, or in any department thereof;" and it was its imperative duty to protect such rights. Thus, the case of the Chinese residents of Nicolaus is clearly distinguishable from that of United States citizens arising under the fourteenth amendment, considered in the case of *U. S. v. Harris, supra*, and rests upon other and further provisions of the national constitution. Had section 5519 been expressly limited in terms, without including any other parties to a conspiracy for depriving, directly or indirectly, *Chinese subjects* residing in the United States of the "equal protection of the laws," or of "equal privileges and immunities under the laws," guarantied to them by the treaties, there could scarcely be a doubt, I think, of its constitutionality and validity. If, therefore, it be void as to the Chinese subjects affected by the acts charged, as well as to similar acts perpetrated upon citizens of the United States, it is only so because congress has attempted to accomplish too much in the same section by the use of language too comprehensive, including persons to whom these powers did not extend, and by so doing has vitiated the whole. It is not because the language does not include them, or for want of constitutional power, but for want of proper form in the provision,—because it is too broad; simply because it has spread too large a net. But Chinese subjects residing in the United States, under the stipulations of our treaties with China, constitute a separate, distinct, independent class, with distinctly defined and easily recognized limits; and it is not readily perceived why the *class* may not be easily segregated, and the provisions of the statute held constitutional and valid, and be fully enforced as to that class, even though void as to other persons and classes, relying on other provisions of the constitution, easily recognized, and without difficulty segregated.

Why should not the principle adopted in *Packet Co. v. Keokuk*, 95 U. S. 80, affirmed in *Presser v. Illinois*, 6 Sup. Ct. Rep. 580, at the present term of the supreme court, apply? The Chinese residents, under the treaty, may be regarded as a subject-matter entirely distinct from citizens of the United States. The provisions of the section as to the states, and as to the territories, operate, cer-

tainly, upon distinct subjects-matter; and the act, I take it, could and would be held valid, under the authorities cited, as to the territories, even though void as to the states and their citizens. They are easily segregated; then why cannot the Chinese residents as one subject-matter be separated from citizens as another, upon similar principles? The language of the court in *U. S. v. Harris* on this point should, doubtless, be considered with reference to the special facts of the case then in judgment. But still, it must be confessed that it is very broad, and the rule laid down may be intended to cover any case that can be brought within the terms of the statute. If so, of course the ruling is authoritative and controlling in this court; but like congress, in the language of section 5519, may not the court also have, inadvertently, used language broader than the exigencies of the case before it required?

It is proper to observe that in the case of Reese there was a defect in the statute, and also in the indictment, in the omission of one constitutional element or ingredient necessary to constitute the offense. Under the fifteenth amendment, then in question, it was necessary that the discrimination should be "on account of race, color, or previous condition of servitude." *This essential element was omitted in the act, and in the indictment, and the court could not perfect the statute or indictment by inserting it.* It was with special reference to this omission that the court made the observations in respect to separating the constitutional from the unconstitutional part of a provision so manifestly indefinite, afterwards repeated in *U. S. v. Harris* with reference to the thirteenth amendment. To the provisions and facts then under discussion the observations seem to me to be more appropriate than to the sections of the statutes, constitutional provisions, and the facts, as now presented. It must be remembered that section 5519 has thus far only been considered by the supreme court with reference to the authority conferred upon congress by the thirteenth, fourteenth, and fifteenth amendments relating to specific subjects-matter. It has never yet been considered with reference to the powers conferred by the more general and comprehensive clauses cited in this opinion from the constitution as originally adopted. The difference between the cases is very obvious, and the result arising upon the different conditions may, and it seems to me should, be entirely different.

The only difficulty I have is in satisfactorily determining whether the rule indicated in *U. S. v. Harris* or that in *Packet Co. v. Keokuk*, *supra*, relating to the segregation of the constitutional from the unconstitutional parts of the section, should be applied to the facts disclosed in the petition, writ, and return in this case. I can perceive no practical difficulty in applying the rule adopted in the latter case. If there is none, it should be applied. The specific question is one of vast consequence to the entire Chinese population of the United States, and of the utmost importance to the peace and good order of

society throughout the entire Pacific coast. It is of international consequence, involving the honor and good faith of the United States, and, possibly, the question of peace or war. If this section of the statute is valid as to Chinese subjects residing in the United States, and embraces the acts set out in the petition and return, then the acts of all the public meetings throughout the land looking to, and providing for, depriving Chinese subjects of the rights, privileges, immunities, and exemptions secured to them by our treaties with China, by means popularly known as "boycotting," or any other coercive means, no matter in what form, or through what channels applied, are criminal, and all those participating in them must be subject to the very severe penalties denounced by the statute. I can perceive no way of escaping this conclusion. The depriving of persons of any of the rights protected, by any means, either "*directly or indirectly*," is prohibited. Where one has a lawful right to do any given thing, it would seem that no body of other persons can, properly or lawfully, combine or conspire together to use coercive means, in any form, to prevent him from doing that thing. The two rights are inconsistent, and cannot properly co-exist. It can make no difference, in principle, whether the coercion is applied by direct force, or by combined and concerted action, to prevent him from exercising his right, by depriving him of the means of procuring a livelihood, and thereby inducing starvation, or even less serious consequences.

If the statute in this particular is not valid, then there are no means now provided by congress of protecting Chinese subjects in the enjoyment of the rights secured to them by the treaties, through the criminal laws of the country, unless the acts are within the provisions of section 5508 or 5336, Rev. St.; and if there is no statute covering the case, then the government has not yet fulfilled its treaty obligations under article 3 of the treaty of 1880. I shall not stop to discuss section 5508, and only remark that section 5336 provides that "if two or more persons, in any state or territory, conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; *or by force to prevent, hinder, or delay the execution of any law of the United States*; or by force to seize, take, or possess any property of the United States, contrary to the authority thereof,—each of them shall be punished by a fine of not less than five hundred dollars, and not more than five thousand dollars, or by imprisonment, with or without hard labor, for a period of not less than six months, nor more than six years, or by both such fine and imprisonment."

A "treaty," says the constitution, is a part of "the supreme law of the land." It has been insisted that the acts set forth in the petition constitute a conspiracy by force to prevent, hinder, or delay the execution of the treaty stipulations, or obstruct their operation, which,

it is said, is equivalent to obstructing its execution, and therefore of obstructing the execution of a law of the United States." If this be so, then the acts charged constitute an offense against the United States under this section as well as under section 5519. I am officially informed that 13 persons have just been indicted under this section in one of the districts of this circuit. But it seems to me that the acts are not so manifestly within the provisions of this section and section 5508 as within section 5519.

The specific questions now presented are questions of too vast consequence to be finally determined by a subordinate court. The peace and good order of the Pacific coast, and the honor and good faith of the nation, are involved, and require that the question should be at once presented to and promptly decided by the supreme court of the United States. The supreme court, in *U. S. v. Harris, supra*, says: "Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional powers. This presumption should prevail unless lack of constitutional authority to pass the act in question is clearly demonstrated." Page 635. If there be any doubt, then, as to the constitutional authority of congress to pass section 5519, in its present comprehensive form, so far as it embraces the specific facts disclosed in this case, which have not yet been considered by the supreme court, or as to the applicability of the observations of the supreme court, in relation to separating the constitutional from the unconstitutional parts of the act, to the specific facts now presented,—the only point upon which I entertain any doubt,—the doubt should be resolved, especially in this court, in favor of the validity of the statute in this particular, and the question be referred at once to the supreme court to be authoritatively determined.

As there is doubt in my mind upon the point suggested, under the authorities as they now stand, I shall, for the present, and for the purposes of this case, rule against the petitioner, remand him to the custody of the marshal, and dismiss the writ. I do not desire, however, to be considered as finally determining the question in such sense that it will not be open for reconsideration, should the question be again presented in other cases before an authoritative decision can be had in the supreme court.

My associate, though with doubt and hesitation, dissents from the rulings made, and a certificate of opposition of opinion will be made if either party desires it, and a writ of error to the supreme court allowed. In view of the circumstances, and of the doubts entertained, should a writ of error be taken the prisoner will be allowed to go at large on his own recognizance until the decision on appeal; and in case the writ is pressed to an early hearing, it is suggested that the government do not prosecute other similar cases arising under the

Revised Statutes, especially such as have already arisen, until an authoritative decision can be had.

Let the writ be dismissed, and the prisoner remanded to the custody of the marshal.

JEFFRIES, Adm'r, v. LAURIE.¹

(Circuit Court, E. D. Missouri. March 31, 1886.)

ATTORNEY AT LAW—CONTEMPT—FAILURE TO OBEY ORDER TO PAY OVER MONEY COLLECTED.

An attorney who disobeys an order to pay over to his client money collected in a suit instituted in this court, may be disbarred and committed to jail for contempt.²

At Law.

For a report of the opinion of the court upon motion for an order to compel Mr. Laurie to pay over the money collected for Mr. Jeffries, administrator, see 23 Fed. Rep. 786.

T. B. W. Crews, for plaintiff.

Joseph S. Laurie, pro se.

BREWER, J., (*orally*.) A brief statement of the preliminary facts in this case is important. The firm of Crews & Laurie were employed to prosecute a claim on a life insurance policy, which they did in this court, and in the supreme court of the United States, with protracted litigation. Before any decision was finally reached by the supreme court, Mr. Laurie, as one of the firm, compromised the claim of the insurance company, and received the sum of nine thousand and odd dollars. No part of that was paid to the plaintiff, but all retained by himself. He retained half of it on the claim that there was a contingent fee of one-half belonging to the firm. He retained the other half on the ground that there were unsettled partnership transactions between himself and his partner, and that his partner, upon a settlement, would be really owing him, and ought to pay this money to the plaintiff, who was his relative.

On the twenty-fourth day of April, 1884, two years ago nearly, the administrator filed a petition in this court for a rule on defendant to pay over the entire sum of \$9,000. On the third of May a rule was issued against the defendant to show cause why he should not pay over this money as prayed, with leave to plaintiff on the incoming of the answer to move in respect thereto in 10 days. June 2, 1884, leave was given to the defendant until the next day to answer. On

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

² See note at end of case.

the third of June, 1884, the answer was filed, setting up, as I said, the claim that one-half belonged to the firm as a contingent fee; and, *second*, these partnership transactions between himself and his former partner, Mr. Crews. The case stood then before the court, upon various applications and discussions, for nine months or so, and until March 25, 1885. During those months sometimes counsel on one side would come in and sometimes counsel on the other, and there seemed to be great disagreement between them as to the state of the case. On March 25, 1885, in an endeavor to put the matter in such shape that there could be a full inquiry, leave was given to the petitioner to traverse the answer within three days. Ten days was given to the defendant to file affidavits in support of his answer, and ten days thereafter to the plaintiff to file counter-affidavits. On March 28th, within three days, a replication was filed by the plaintiff. On April 10th defendant filed his affidavits. On April 24th plaintiff filed his affidavits. On April 29th the case was submitted to the court. On May 1, 1885, 11 months ago, an order was made on the defendant to pay within 90 days into the registry of this court the sum of \$4,635.50, that being the half conceded to be due to the petitioner. The matter has stood without further action from that time to this,—11 months. The money has not been paid into court. An application was made, and on that application an attachment was issued against Mr. Laurie on yesterday; and in response to that, his reply is that he has understood that Mr. Crews, his former partner, has settled with the administrator, and paid him that balance. No testimony is offered to support that. He further says that he expects to contest this final order, and to pursue remedies which the law gives to him for setting it aside. But nothing has been done during these 11 months.

In the case *In re Paschal*, decided in 10 Wall. 491, by the supreme court of the United States, which was a proceeding against counsel of that court, the court uses this language:

"The application made for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety, calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duties under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client, and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court, and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money in conformity with his professional duties. The application against him in such cases is not equivalent to an action of debt or *assumpsit*, but is a *quasi* criminal proceeding, in which the question

is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over."

There was a claim in this case of a contingent fee of one-half,—a claim disputed. In respect to that claim the court took no action, but as to the one-half which was confessedly due to the plaintiff, the court held, and I have no question but what it held rightly, that it was no excuse to the attorney who received the money for not paying it over that he had an unsettled partnership dealing with his former partner in the practice of the law. The party who received the money in this case, upon whom lay the primary duty of paying it over, was this defendant. He could not make his client suffer by reason of any quarrel with, or even wrong committed on the part of, his former partner. That duty he must discharge, and then, in appropriate proceedings, settle any controversies which he has with his former partner. It was upon that basis that the order was made. Ninety days was given for a compliance with the order. Eleven months have passed. This proceeding has been pending two years. Some time prior thereto the money was collected. Unpleasant as the duty is in such case, I know of but one way for a court to act, and that is to act firmly.

The defendant will be adjudged guilty of contempt of court, and the order will be that his name be stricken from the rolls of this court, and that he be debarred from practicing in this court; and, further, that he be committed to the jail of this city for the period of 90 days.

NOTE.

For a full discussion of the question of disbarment of attorneys, the grounds therefor, and proceedings in, etc., see *In re Wall*, 13 Fed. Rep. 814, and note, 820-823.

The supreme court may disbar an attorney for misconduct in fraudulently appropriating his client's money collected by him. *In re Treadwell*, (Cal.) 7 Pac. Rep. 724; *People v. Cole*, 84 Ill. 327; *Kepler v. Klingensmith*, 50 Ind. 434; *People v. Palmer*, 61 Ill. 255.

An attorney may be debarred for fraudulently and falsely representing that his client's money has not been collected, in order that he may retain the same. *Slemmer v. Wright*, (Iowa,) 6 N. W. Rep. 181.

In Re Temple, (Minn.) 23 N. W. Rep. 463, a note was sent to an attorney for collection, and the attorney, without the knowledge or consent of his client, agreed with the maker of the note that if she would board his law partner that he would credit her with the amount on the note. The attorney having failed to account to his client for the amount thus collected, was suspended from practice for six months.

JEFFRIES, Adm'r, v. LAURIE.¹

(Circuit Court, E. D. Missouri. April 2, 1886.)

1. ATTORNEY AT LAW—DISBARMENT FOR FAILURE TO OBEY ORDER TO PAY OVER MONEY COLLECTED FOR CLIENT—MOTION FOR REHEARING OVERRULED.
2. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—CONTEMPT—ATTORNEY AND CLIENT.

Imprisonment for contempt in failing to obey an order to pay over money collected for a client is not "imprisonment for debt," within the meaning of section 16 of article 2 of the constitution of Missouri. Lack of money is no excuse in such cases.

At Law. Motion for rehearing. For previous opinions herein, see 23 Fed. Rep. 786, and *ante*, 195.

T. B. W. Crews, for plaintiff.

J. S. Laurie, *pro se*.

BREWER, J., (*orally*.) There is one other matter which I must dispose of this morning, and that is the motion for rehearing in *Jeffries v. Laurie*. There are two questions presented:

One, whether, under the circumstances of the case, there should have been any order punishing for contempt. Counsel has filed two briefs, arguing that it is, as the case now stands, practically no more than an attempt to collect a debt by the process of imprisonment, which is forbidden by your constitution. He says, "Here is an order for the payment of money, and the party has not the money with which to comply with the order, and therefore the court punishes by imprisonment simply for failure to pay money in accordance with the order." I think counsel misapprehend the situation. The punishment is not technically and simply for a disobedience of an order, standing by itself, for the payment of money. The matter lies deeper than that. This proceeding is based upon the fact that counsel has collected money, and failed to pay it over to his client, and the order which was made for payment is simply an adjudication of the existence of the prior wrong. If it had been shown that counsel collecting money had been robbed of it, or had lost it by means beyond his control, of course no peremptory order for payment would have been made. The fact that the order was passed is upon the idea that there had been prior misconduct in not paying over; so this is not to be treated as an attempt to collect a debt by imprisonment, but as a summary proceeding resting wholly upon the fact of the professional misconduct of the attorney in collecting money belonging to his client, and appropriating it to his own use. The order was simply one step in the proceeding.

The other matter is this: Waiving the question of the power of the court to punish for a contempt, it is insisted that the order disbar-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ring was beyond the scope of this proceeding, and beyond the power of the court in this proceeding. My attention was called to two or three cases decided by the supreme court of the United States, in addition to the one to which I referred day before yesterday.

First, let me say that the case, *In re Paschal*, 10 Wall. 491, which I referred to, and on which I based my order, was a case exactly parallel with this. The motion in the *Paschal Case* was for an order on Paschal to pay to the clerk of the court, for the benefit of the state of Texas, the sum of forty-seven and odd thousand dollars in gold, alleged to have been collected by him in certain litigation. To that motion defendant answered, admitting the receipt of the money, but setting up the grounds under which he retained it; and upon that motion, precisely like this, the court, by Mr. Justice BRADLEY, without any dissenting opinion, says, that "for such improper conduct the court may entertain summary proceedings against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices."

The case of *Ex parte Bradley*, 7 Wall. 364, was this: Joseph H. Bradley was, as alleged, guilty of contempt of the criminal court in the District of Columbia. One of the judges of the supreme court held that criminal court, so proceedings were commenced in the supreme court of the District of Columbia to punish him for that contempt, but the supreme court of the United States held that the supreme court of the District of Columbia had no jurisdiction of a contempt against the criminal court of the District, and therefore that the charge made was one which the supreme court of the District of Columbia could not entertain; and, further, that that being the only matter charged in the complaint, the court had no power to disbar Mr. Bradley.

In the case of *Ex parte Robinson*, 19 Wall. 505, the grand jury of the Western district of Arkansas reported to the court that a witness, when subpoenaed, had fled, and that he said that he was advised to do so by Mr. Robinson. Upon the report of the grand jury the court ordered an attachment against Mr. Robinson, and he being brought up and called upon to answer, declined to answer, and the court disbarred him. The supreme court set that aside, holding that the specific charges against him were not such as to justify the action, and that, while the court might punish for misconduct in open court, (in the return to the writ of *mandamus* it was stated that Robinson said he would not answer, and spoke in a loud and disrespectful tone,) yet the power to punish for contempt simply was limited to fine and imprisonment. But that does not in any manner limit or qualify this decision in *Re Paschal*, although it holds that the proceeding for disbarment is a separate matter.

In the case of *Ex parte Wall*, 107 U. S. 265, S. C. 2 Sup. Ct. Rep. 569, Wall was charged, by an order entered of record, with conduct unbecoming an attorney. It appeared that he had been guilty of no

misconduct as an attorney. The matter which was charged and proved against him was that he had joined a mob that had taken a man out and hung him, and he contended that the court had no power to punish him as an attorney, or disbar him for misconduct not as an attorney, but misconduct affecting his general character as a citizen; that if he had been guilty of any wrong in that respect, he should have been prosecuted by indictment, and, if convicted of an offense against the criminal law, then, and only then, could he be disbarred. The supreme court, with a vigorous dissent, sustained the order of disbarment, holding that, although the conduct was not conduct as an attorney, or in his character as an attorney, yet it was conduct of such a nature as that showed he was not fit to be an attorney, and that no previous indictment and conviction were necessary.

But that throws no light upon this question, for there there was a distinct charge, and the sole inquiry was as to the sufficiency of the charge. Now, in this case, there was a distinct charge of the very misconduct which the supreme court, in *Re Paschal*, says is ground for removing an attorney. To that charge, stated in full and filed upon the records of this court, there was an answer, followed by inquiry and adjudication. It seems to me that it comes plainly within the decision in *Re Paschal*; and while, of course, it is not a pleasant thing for the court to do, and reluctantly I take cognizance of any motions of this kind, yet I think the good name of our profession requires action. It would be a severe criticism upon our profession if clients were advised, by the failure of the court to act, that their counsel could keep their money because of a quarrel between themselves.

The petition for rehearing will be overruled. The order will be that the party may go on bail for the period of 10 days, upon giving bond in the sum of \$2,000 for his appearance at the end of that time; the imprisonment, unless the order therefor be set aside by the supreme court, to commence at the expiration of the 10 days.

UNITED STATES v. WHITE and another.¹

(Circuit Court, E. D. Missouri. March 29, 1886.)

1. COUNTERFEITING—COUNTERFEITING SECURITIES OF FOREIGN NATIONS—LAW OF NATIONS.

Counterfeiting the securities of a foreign nation is an offense against the "law of nations," within the meaning of section 8 of article 1 of the constitution of the United States.

2. SAME.

It is not necessary, in order to make a statute providing a punishment for an offense against the law of nations valid, that it should describe the offense as being one against that law.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

3. SAME—ACT TO PREVENT COUNTERFEITING SECURITIES OF FOREIGN GOVERNMENTS.

Section 6 of the act of May 16, 1884, entitled "An act to prevent and punish counterfeiting within the United States of notes, bonds, or other securities of foreign governments," is valid.

4. STATUTES—CONSTRUCTION.

That construction should be placed on the language of a statute which will uphold, rather than that which would defeat it.

Indictment for Counterfeiting Treasury Notes of the Empire of Brazil. Motions to quash, and in arrest.

William H. Bliss, for the United States.

Herring & Kelley and *Joseph G. Lodge*, for defendants.

BREWER, J., (*orally*.) In the cases of the *United States* against *Joseph H. White* and another there are motions to quash certain indictments and motions in arrest. The question presented in them is as to the validity of an act entitled "An act to prevent and punish counterfeiting in the United States of notes, bonds, or other securities of foreign governments." The power of congress to pass such an act is claimed under section 8 of article 1 of the constitution, which gives to congress power "to define and punish piracies or felonies committed on the high seas, and offenses against the law of nations."

Now, in respect to matters of dealing between this country and foreign nations, the general government is the single representative of our people. No state can enter into any treaty or compact whatever with any foreign nation. The powers the states have are over their own citizens, in local matters. In respect to all matters affecting our relations, or the relations of our citizens, with foreign nations, the general government is the single representative. It alone takes cognizance within our territory of any infraction of the law of nations. "International law" is a term which has not, as yet, perhaps, been fully and accurately defined, or rather the specific matters to which it may extend, and its scope may not be fully settled. It includes the entire body of obligations which one nation owes to another, in respect to its own conduct or the conduct of its citizens towards other nations or their citizens. Of course, in early times, when nations lived in a state of Chinese seclusion, the specific matters to which international law was applied were practically few, but as commercial dealings, travel, and intercourse increased between them, these specific matters largely increased, and will increase the nearer the nations come together. The closer the world comes to a recognition of the poet's dream of "the parliament of man, the federation of the world," the wider will be the scope of international law.

Now, foreseeing all these possibilities in the future, the framers of our constitution gave to congress the power to define and punish offenses against the laws of nations. Judge STORY, in the case of *U. S. v. Smith*, 5 Wheat. 153, said:

"Offenses against the law of nations cannot, with any accuracy, be said to be completely ascertained and decided in any public code recognized by the

consent of nations. In respect to felonies committed on the high seas, and offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish, and there is not the slightest reason to doubt that these considerations had very great weight in producing the phraseology in question."

Now, does the counterfeiting of securities of a foreign nation come within the reach of international law? I put the question to counsel in the argument: "If this nation should itself engage in the business of counterfeiting the coin or securities of a foreign nation, would not that be treated as an infraction of the law of nations,—a *casus belli*?" and counsel very promptly responded that it would. Well, if the act of the nation in counterfeiting would be an infraction of the law of nations, similarly the act of the citizens of that nation in counterfeiting the same securities would be an infraction.

One of the latest utterances in the matter of international law is the work of David Dudley Field, who prepared a draft of a code therefor, and in his "Outlines of an International Code," second edition, page 626, he recognizes the offense in question as coming within the description of offenses against the law of nations, by declaring that every person commits a public offense who, within the jurisdiction of a nation a party to the Code, forges, among other things, any public security issued, or purporting to have been issued, under the authority of any nation, for the payment of money or delivery of property." Surely it would be a gross infraction, as it seems to me, of the law of nations to turn this nation into a counterfeiting shop for the securities of the world. It is true, the constitution declares as one of the main objects of its existence "to promote the general welfare," and counsel urged that that was limited to the general welfare of the people of this country. Concede that, but in a moral sense it certainly promotes the general welfare of our citizens to see that they do not engage in the business of counterfeiting any valid security; and in a pecuniary sense, as my Brother TREAT well said in our consultation, the counterfeiting of foreign securities may work a direct injury to our own citizens. Take the case at bar. Supposing these securities had been perfected and placed on the market here, and some one, taking a trip to Brazil, had invested in them, and then, on visiting Brazil, found to his dismay that they were all counterfeit. Such citizen of this country would be the pecuniary sufferer; so that both in the highest moral sense and in the lowest pecuniary sense, it is true that the general welfare of this country is promoted by putting a stop to the counterfeiting of any securities.

Our statutes are full of laws designed to prevent wrongs done by our citizens to foreign nations, or citizens thereof; some punish the forming of insurrectionary expeditions here with a view of invading foreign nations, and thus tend to preserve the peace and harmony between nations. Indeed, in the famous Alabama case, the basis of our claim against the English government was not that it had organ-

ized expeditions to prey upon our commerce, but that it had not exercised due precautions to prevent its citizens from thus trespassing upon our commerce. Surely, the counterfeiting of the securities of a foreign nation is one of those things which would tend to interrupt the peaceful relations between two nations, as well as to trespass upon the property rights of individuals and nations.

We neither of us have any doubt but that congress has the power to punish such offenses. And while congress is given the power to define and punish, it is not necessary, in order to make a valid statute, that, upon the face of it, it name the acts denounced as offenses against the law of nations. It is enough if it describes the act, and denounces it with punishment, and that the act in its nature comes within the scope of international obligations.

Further, as a second point, counsel insisted that this sixth section of this statute, under which these indictments were framed, was void, in that it does not incorporate and embrace a declaration of a fraudulent intent, and by its letter punishes the printing and engraving of any instrument of the likeness and similitude of a foreign security, or any part of it. Counsel said, would it be possible that a man could be guilty of a crime who put upon a mere badge or page of a book a single portion of one of the designs found upon a foreign security? Well, we are to place that construction on the language of a statute which will uphold, rather than that which will defeat, the act. The title of the act interprets its scope,—“An act to prevent and punish counterfeiting within the United States.” A thing may sometimes be within the letter and not within the spirit of a statute, and therefore without the statute; and sometimes it may be within the spirit, and not within the letter, and still included in the statute; and this, even in criminal cases. It is unnecessary to speculate about such a case as counsel suggests. Here the indictment presents a copy of the security, and charges that it was engraved and printed with an intent to defraud. This brings it within the spirit and letter of the statute.

I think that objection should be overruled. The motions to quash and in arrest will both be overruled, and the cases remanded to the district court for further proceedings.

HOE and others v. KNAP and others.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—PRINTING-MACHINES.

Letters patent No. 269,159, of December 12, 1882, to Luther C. Crowell, for a sheet-delivering mechanism for printing-machines, construed, sustained as to the sixth claim, and held infringed.

2. SAME.

So far as appeared from the proof in this case, Crowell was the first to superimpose the sheets, as they follow each other from a web printing-press, by causing them to travel in different pathways of equal lengths, and to stop or retard the advance sheet until the following sheet or sheets is or are brought abreast of it, when they move at a common rate of speed to a point where they come together; and he is therefore entitled to protection against the use of equivalents by others.

3. SAME—RICHARD M. HOE PATENT, No. 211,848, FEBRUARY 4, 1879, FOLDING-MACHINES.

Infringement was charged of the fifth claim of this patent, which was for "the combination of brake-arms, rest-blocks, and supporting carrying-tapes, substantially as described." Held, the true construction of this claim required that the folding blade or rollers, described by the patent, be read into this claim, and that under this construction the defendants did not infringe.

4. SAME.

The defendants did not use the stopping or retarding device of the patent for the purpose it described, and they had the same right as patentee to take another element from the older art, and use it in combination with the elements he described, for another purpose, in their machines.

5. SAME—VOID REISSUE.

The first claim of the Hoe & Tucker patent (reissue No. 8,801, of July 15, 1873) printing-machines is void because an unwarranted enlargement of the original patent, which was granted December 1, 1868, and of the first reissue, which was granted May 30, 1871.

6. SAME.

The second claim of the original of the Hoe & Tucker reissue sued on, and the corresponding claim of the first reissue, included the flies or piling mechanism described; but the first claim of the reissue sued on does not, and it is therefore void.

7. SAME—PATENTABILITY.

In view of the prior state of the art, the court doubted whether this patent was not void for want of patentable novelty.

8. SAME—PRACTICE—INJUNCTION.

Where the owner of a patent had never made, used, or sold to others to be used, the invention covered by the patent, an injunction, in the interlocutory decree, against its use by an infringer was refused, on his giving bond to secure any damages which might be awarded on final hearing.

9. SAME—PATENTEE MUST USE OR ELSE PERMIT OTHERS TO USE.

A patentee is bound either to use the patent himself, or allow others to use it on reasonable and equitable terms.

In Equity.

Offield & Towle and Munson & Philipp, for complainants, (B. F. Thurston, of counsel.)

West & Bond, for defendants.

BLODGETT, J. Complainants, by this bill, seek an injunction and accounting for the alleged infringement by defendants of three patents

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

owned by complainants; the first being patent No. 269,159, granted December 12, 1882, to Luther C. Crowell, for "a sheet delivering mechanism for printing-machines;" the second being patent No. 211,848, granted to Richard M. Hoe, on February 4, 1879, for "an improvement in paper-folding machines;" and the third being reissued patent No. 8,801, granted to complainants as assignees of Richard M. Hoe and Stephen D. Tucker, July 15, 1879, for an "improvement in printing-machines;" the original patent having been granted December 1, 1868. All these patents, it is averred in the bill, have been duly assigned to complainants, and no question is made as to the title to either patent.

The Crowell patent is for a device whereby the sheets issuing successively from a web printing mechanism are brought together so that one may overlies the other. In modern newspaper printing it is found desirable to make a paper of eight or more pages, and as the sheets of four pages each pass successively from the printing rollers the problem is to cause one or more of the sheets following the first to overtake and be laid upon the first, so that when they reach the folding mechanism they will be folded together as one product. In the specification it is said:

"The invention consists, broadly, in causing the rear sheet or sheets, during some portion of its or their travel through the delivery mechanism, to move at a greater speed than the advance sheet, so that the sheets shall be caused to overlap each other, and eventually be imposed upon one another in proper register."

This inventor was not the first who superposed one sheet upon another before they reached the folder, as prior inventors had accomplished the same result, one device being such an arrangement of tapes and rollers as to cause the first sheet to travel by a longer pathway, while the following sheet took a short pathway, and overtook the first at the point where the respective pathways came together. Another device caused the first sheet to be stopped and held upon a cylinder until one or more following sheets had been brought up and placed upon the first, when the cylinder rolled forward and delivered the sheets one upon the top of the other. The distinguishing feature of the Crowell device is that the sheets are conducted by pathways of equal length, and that after the first sheet has passed into its separate pathway, it is either held stationary, or its motion retarded, until the following sheet has got abreast of it in its own pathway, when the holding or retarding device releases the first sheet and they move on together to the point where their pathways unite, when the second sheet is brought on the top of or superposed upon the first sheet, from whence they proceed to the folder, where they are folded together into a paper of eight pages or more, according to the number of sheets brought together. The elements of this device are two or more pathways of equal length, formed of tapes and rollers properly arranged for that purpose; a switch located at the entrance to these pathways,

automatically operated, so as to direct the first sheet in the pathway where it is to be detained or retarded, and the following sheet, when but two are to be brought together into the pathway, where it will run without obstruction; and a retarding device which consists of two rollers with portions of their surfaces cut away, so arranged that as the first sheet passes between them it will be held still, or its motion slowed, until the following sheet in the other pathway arrives abreast of it, when the first sheet is released, and the two move at a common speed to a point where the pathways unite.

The patent contains seven claims, but infringement is charged only as to the sixth, which is as follows:

"The combination with a series of pathways of equal lengths, of means for guiding the successive sheets into different pathways, and means for retarding the speed of the advance sheet until the following sheet is abreast thereof, substantially as described."

The defenses as to this patent are (1) that the patent is void for want of novelty; (2) that Crowell is limited by the prior art to the special devices shown in his patent, and the defendants do not use these devices; (3) that defendants do not infringe.

As to the first defense, I think the only conclusion from the proof in the record is that Crowell was the first to superpose the sheets as they follow each other from a web printing-press by causing them to travel in different pathways of equal lengths, and stop or retard the advance sheet until the following sheet or sheets is or are brought abreast of it, and they then move at a common rate of speed to a point where they come together. Other machines had carried sheets in pathways of unequal length, whereby the advance sheet, traveling by a longer route, reached the point where the two pathways met at the same time with the following sheet, which took a short road, whereby one was laid upon the other; but none had accomplished the work of superimposition by sending the sheets which were to be laid together on pathways of equal lengths, before Crowell's invention. It is true that machines older than Crowell's device, and used for various purposes connected with the work of printing and delivering printed sheets, directed the sheets in different channels or pathways by means of switches, and the record also shows older devices for slowing or stopping the movement of sheets; but none of them show an organization of parts like Crowell's to do the work of superposing by the same means, and I think there can be no doubt that it required inventive genius to so arrange these parts as to perform the desired work, at the time Crowell entered the field. After he had produced his combination of co-acting parts, it may be very easy to find all these parts or elements separate in the older art, and, perhaps, doing in some older machines just what each separate element of Crowell's combination does in his machine,—that is, switches directing the sheets alternately into different pathways, and brakes or brake-rollers holding back or retarding the movement of a sheet in its

pathway; because Crowell did not invent switches nor pathways for sheets, formed by rollers and tapes, nor retarding devices, but he brought them together to co-operate in producing a result which had not been produced before by the same elements; and it is no answer to his claim as an inventor to say that the same result had been produced before by some of the elements of his combination acting with others, but in a substantially different way.

The two parts of the second point of defense may well be considered together. Defendants contend that their machines do not contain two pathways, and hence that they do not infringe. Their machine shows an organization of parts whereby the sheets, as they leave the common pathway which brings them from the printing rollers, are directed, by the operation of what is called a "dividing finger," alternately "over and under" a small roller and plate or bar. This roller and bar keep the upper tapes lifted from the lower, and aid the tapes in carrying the sheets over the roller and bar, and as the roller does not quite touch the lower tapes, it does not interfere with or retard the sheets passing under it. A rock-shaft is provided with fingers, which are made to fit against the bar or plate to hold the rear end of the advance sheets until the following sheet has caught up with it, and at this point to release the detained sheet, and allow the two to move on together. This description is given by one of the defendants, Mr. Kahler, of the construction and mode of operation of defendants' machine. What he calls the "dividing fingers," which are located at the entrance to this pathway, are nothing more nor less than a switch substantially identical in its structure and operation with Crowell's switch, "16." Its function is to "direct the advancing sheets over and under the roller and plate or bar." This roller divides Mr. Kahler's pathway into two pathways; the sheets which go over the roller and bar take one pathway, and those which go under the roller and bar take the other pathway. It is true the pathways are closer together than those shown in Crowell's arrangement, and are formed with a less number of tapes and rollers, but they are separate ways, nevertheless, and are intended to and do enable the following sheet to come along-side of or abreast of the advance sheet, which must be done by one sheet being deflected into a different pathway from that taken by the other.

The diameter of the roller and bar measures the distance between those pathways; one sheet goes over and the other under the roller. When the tail or rear end of the advance sheet reaches the bar or plate it is caught between the fingers of the rock-shaft and the plate, and held there until the following sheet has passed under the roller to a point directly underneath the first, when the first sheet is released, and the two proceed together, their paths uniting immediately beyond the bar which has separated them. The rock-shaft, with its fingers arranged to be brought down upon the bar or plates, so as to catch the advance sheet and hold it until the following sheet over-

takes it, is, as appears by the proof, a known equivalent for the cut-away rollers used in the Crowell patent. Indeed, a rock-shaft with fingers is but a roller with all of its periphery cut away except the fingers; and there can be no doubt that the defendants' rock-shaft does in the defendants' machine just what is done by the cutaway rollers of the Crowell machine, and no more. So, too, the roller which divides the pathway of the two sheets, and over and under which the switch directs the sheets as they reach it, is an adjunct to, and forms a part of, the pathway in place of some of the tapes shown in the Crowell machine; but this does not make any substantial difference, because a roller for that purpose only takes the place of other devices shown by Crowell. It therefore seems to me that the defendants' machine embodies the entire elements of the Crowell device,—the switch, the two pathways of equal lengths, and the mechanism for detaining the advance sheet until the following sheet in its own separate pathway has been brought along-side or abreast of it,—and these respective elements perform the same function and no other in the defendants' machine that are performed by the corresponding elements in the Crowell device. It therefore seems to me that the allegation of infringement is fully sustained by the defendants' own description of the structure and mode of operation of their machine, nor do I find, in a large mass of prior patents and devices shown in the record, any device or combination which should limit the Crowell patent to the special devices shown therein; that is, that he must be confined to just such a switch, and just such a detaining device, as he shows, and is not protected against known equivalents for those parts. On the contrary, I conclude, as I have already said, that he was the first to combine these elements and produce the given result, and is therefore entitled to protection against the use of equivalents by others.

This being a combination of old devices for the purpose of producing a given result, we must look from the claim back into the description of the patent as found in the specification and drawings for the elements of the combination which produce the result, and a reference to this description shows clearly the elements for guiding the successive sheets into different pathways, and the means for retarding the advance sheets which the inventor intended to employ, and also several variations to produce modified results. In other words, what is covered by the claim is made entirely clear by the specifications and drawings, and this claim of the patent is amply sufficient, under the rule laid down in *Silsby v. Foote*, 14 How. 218, and *Fay v. Cordesman*, 109 U. S. 408, S. C. 3 Sup. Ct. Rep. 236.

It is urged, however, that the claim as stated does not cover the result,—that is, the superposing of one sheet upon another,—as it leaves the sheets to go where they may after the second has been brought along-side of the first. But it seems to me a sufficient answer to this part of the argument to say that both the Crowell and the defendants'

machines are organized for the same purpose,—to bring the sheets abreast of each other for the purpose of being superposed. If defendants, after bringing their sheets together, did not superpose them, and did not bring them abreast of each other for that purpose, but for some other purpose, and sent them off in different ways, there might be much more force for the defendants in this branch of the argument; but they do what Crowell does, and for the same purpose, and, as I am compelled to find, with his identical means.

The Hoe patent, No. 211,848, is for a "folding-machine." The inventor says:

"My invention relates to folding-machines, supplied at a high rate of speed with sheets to be folded, and particularly to that class of folding-machines adapted to work in conjunction with a perfected printing-press, which prints from a web of paper, cuts it into sheets of proper size, and delivers them as rapidly as cut and printed. Where these sheets pass directly into a folding-machine, they move with such velocity that great difficulty is experienced in arresting them in such relation to the folding mechanism as to be folded accurately, upon a given line, without buckling. The object of my invention is to overcome this difficulty, and it consists in sheet-controlling mechanism by which the movement of the sheet with respect to the folding mechanism is so governed as to secure its position in relation to the folding mechanism at the time when said folding mechanism operates to double it, as will be more fully hereinafter described and claimed."

He then describes a rest-block placed just over the tapes under which the sheet passes, located directly over the folding rollers, and the rock-shaft with brake-arms, and the vibrating fingers attached, arranged so as to be brought to bear against the rest-blocks by a movement of the shaft; and as the sheet is brought rapidly under the tapes it is caught at the rear end by the action of the rock-shaft between the brake-arms and the rest-blocks, and its progress either retarded or wholly stopped, whereby the buckling or wrinkling of the sheet by bringing its forward end at a high rate of speed against the stop is prevented.

The defendants are charged with infringing the fifth claim of this patent, which is as follows: (5) The combination of brake-arms, rest-blocks, and supporting carrying-tapes, substantially as described.

Without taking time to analyze and discuss the large amount of testimony, both of experts and as to the prior art, which has been put into the record, I am of opinion that the true construction of this claim requires that the brake-arms, rest-plates, and carrying-tapes are to co-operate with the folding-blades or rollers. In other words, that the folding-blades and rollers are to be read into the claim; and under this construction the defendants do not infringe, as the only place where they stop or retain their sheets is in the double pathway, for the purpose of superimposition. This stopping or retarding device in this patent is not used by defendants in their machine for the same purpose as used by Hoe in his patent; and as stopping or slowing devices by means of brake-arms and rest-blocks, and by nipping

rollers, was old in the art at the time of the Hoe patent, and he took and used it as one of the elements of his combination, the defendants had the same right to take it from the older art, which had become public property, and use it for any other purpose in their machines.

The Hoe & Tucker patent, No. 8,801, is for a device where flat, single sheets are fed into a cylinder printing-press from two tables, and after being printed are conducted by means of a switch into different pathways, so that the sheets are delivered alternately from opposite ends of the machine. At the time the original patent was granted, in December, 1868, a difficulty had been encountered by the fast presses then in use in delivering the printed sheets as rapidly as they could be printed, and the purpose of this device was to furnish two flies to the press, so as to divide the work of laying off the printed sheet between the two flies. In order to supply the two flies, two pathways or routes were arranged, with tapes and rollers, and the stream of sheets, as they issued from the printing rollers, was divided, each alternate sheet going to one, and the following going to the other, end of the machine, and to the flies at those ends. The patentees describe the device and its purpose in their specifications as follows:

"This invention consists, mainly, in a mechanism whereby sheets are successively carried onward for delivery, with which co-operate automatically moved switches, that operate to direct alternate sheets conveyed within their range of action into separate conducting channels. It also embraces the combination with said vibrating switches of cylinders constructed of separate pulleys placed on a common shaft."

They then described the construction of parts of the mechanism, and the operation of the printing devices, and say:

"In the manner above described, the sheets of paper are taken alternately from the feeding-tables by the same feeding-in mechanism, so that the machinery can be carried at the desired velocity to print sheets on both sides as fast as the said sheets can be presented by operatives from the two feeding-tables, 20, 30. * * * The sheets of paper will be delivered from such a printing-machine too rapidly to be laid in one pile by the mechanism usually employed for that purpose, and known as the 'fly,' as such mechanism has heretofore applied."

They then proceed to describe the means by which the sheets as printed are alternately guided into different channels so as to deliver to flies located at each end of the mechanism, and say:

"In this way the sheets of paper are taken and alternately delivered in opposite directions, so as to be separated, which sheets may be delivered in two piles alternately, on one and then on the other side, either by two separate fly-frames, or the equivalent thereof, a double-acting fly-frame."

The reissued patent contains five claims, of which only the first is alleged to be infringed, which is as follows:

"(1) The combination with a sheet-conducting mechanism, whereby sheets are successively carried onward for delivery; of automatically moved switches, that operate to separate alternate sheets, and direct them into separate conveying channels,—all substantially as described."

The complainants insist that the device covered by this claim is found in the defendants' machine; that is, that defendants' machine shows the sheet-conducting mechanism by which the sheets are successively carried forward for delivery, and automatic switches that direct the alternate sheets into separate channels.

Several grounds of defense are interposed by the defendants, but, from the view which I take of this patent, I do not deem it necessary to consider them at all. The first defense is that this claim of the reissued patent is void, because it is not found in the original patent, but is an enlarged and different claim from any found in that patent. It is contended by the complainants that the claim now under consideration is substantially the same as the second claim of the original patent. This old second claim reads as follows:

"(2) Separating the sheets by mechanism, substantially as described, so that they would be delivered in files, substantially as set forth and specified."

This patent was reissued May 30, 1871, as reissue No. 4,400, and in that reissue the second claim was stated as follows:

"(2) Separating or changing the direction of printed sheets of paper, so that they may be automatically piled in two or more piles, or in more than one pile, by mechanism constructed and operating substantially as described."

The apparent object of this reissue was to correct, so far as this claim was concerned, a clerical error in using the word "files" instead of "piles." It will be seen that in the second claim of both the original and the first reissue the claim is for something more than changing the direction of the printed sheets of paper; but they must be changed so that they may be automatically piled in two or more piles, which provision necessarily required the claim to include the flies or other devices for piling the sheets at the ends of the machine. By the reissue now under consideration, which was made July 15, 1879, the whole idea of piling, or any other purpose in which the flies or any other device is used, is left out, and the claim covers simply a sheet-conducting mechanism in combination with automatically moving switches that operate to separate alternate sheets, and direct them into separate conveying channels. The proof shows that this patent was applied for in June, 1864, at which time folding devices in connection with fast printing-presses were little used, if known; but the printed sheets were delivered from the flies to be folded by hand. In the progress of the improvements upon printing mechanism these folding devices became an essential attachment to all fast-operating presses, and the evident purpose of the reissue of 1879 was to make this first claim cover any device by which the sheets were directed by automatic switches into different channels, whether for the purpose of being delivered to flies or to be carried to the folding mechanism. At all events, it seems very clear to me that this reissue is an enlargement of the original claim, and even of the second reissue, because I think there can be no doubt that the second claim of the original and first reissue included the flies or piling mechanism. I am therefore

of opinion that this reissue is void, under the rules of the supreme court in *Miller v. Bridgeport Brass Co.*, 104 U. S. 350; *Mahn v. Harwood*, 112 U. S. 354; S. C. 5 Sup. Ct. Rep. 174; *Wollensak v. Reiher*, 22 Fed. Rep. 651.

It may, also, I think, be well doubted whether this patent is not void for want of novelty. The proof shows, and the claim in question in fact admits, that automatically moved switches, for the purpose of directing sheets into different channels, were old at the date of this patent; and that a switch organized and arranged to change the direction of the sheets of paper alternately as they came from the printing-press into different channels could not be made the subject of a patent in combination with those channels, except where some specific result or purpose was obtained thereby. The switch might operate to drop the sheets in different piles as they fell from the press, or throw them into shutes, or even into different channels, but unless it did something more than merely throw them into different channels for the purpose of being conveyed away or delivered at different points, it would hardly seem to be a patentable arrangement, in view of the state of the art. I therefore conclude that the defendants infringe the sixth claim of the Crowell patent, as alleged in the bill, and that they do not infringe the Hoe patent, No. 211,848; and that the first claim of the Hoe & Tucker reissue No. 8,801 is void.

The proof on the application for a preliminary injunction was to the effect that the complainant, the owner of this patent, had never used it, and never constructed a printing-press with the Crowell device. The argument is that the owner of this patent was a very large manufacturer of printing-presses; that they did not manufacture and keep printing-presses in stock, but only make them to order; and that they have received no order as yet to make a press containing the Crowell device. The question, therefore, arises whether the court will grant an injunction in favor of the owner of a patent who has not, after a reasonable time, put it into use, against another who is using it. I think, under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or allow others to use it on reasonable or equitable terms, and as I refused an injunction on the motion before the hearing, I shall refuse an injunction in the interlocutory decree, and allow the defendants to continue to use the patent on their giving bond as they have heretofore.

A decree may be prepared accordingly.

STEAM-GAUGE & LANTERN CO. v. MEYROSE.¹

(Circuit Court, E. D. Missouri. March 29, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ESTOPPEL—JUDGMENTS.

Where, in a suit for the infringement of a patent, the bill is dismissed because of failure to show any infringement, the decree dismissing the bill will not estop the plaintiff, or his assigns, from again suing the same defendant for infringing the same patent.

2. SAME.

In order to make a judgment available as a technical estoppel in a case, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined.

In Equity. Plea in bar.

Hough, Overall & Judson and *E. S. Jenny*, for complainant.

Edward J. O'Brien, for defendant.

BREWER, J., (orally.) In the cases of *Steam-gauge & Lantern Co. v. Meyrose* there are pleas of a former adjudication. The pleas set out that in 1880, in an action between the assignors of these plaintiffs and this defendant, a decree was entered dismissing the bill on the merits, and it is contended that that is an adjudication and estoppel against these bills. The complainants allege in this bill their patent, and that the defendants at this time and since that decree have been making lanterns which are an infringement upon their patent. How far can that decree on the merits, dismissing the bill, estop these complainants?

The estoppel must be certain. In the case of *Russell v. Place*, 94 U. S. 606, Mr. Justice FIELD closes his opinion in these words: "According to Coke an estoppel must be certain to the very intent, and if, upon the face of a record, anything is left to conjecture as to what is necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." The same doctrine is affirmed by a multitude of courts, quotations from whose opinions are found in the brief of the plaintiff. I give a few of them:

In *Hooker v. Hubbard*, 102 Mass. 245, is this language:

"The court are of opinion that upon the facts here presented the learned judge erred in extending the doctrine of estoppel by former judgment to the decree stated. Estoppels of this description are attended with qualifications which must be strictly observed. They are conclusive only as to facts which were directly put in issue and determined in the former suit. If the pleadings present several distinct propositions of fact, the judgment is not conclusive upon any one of them, unless it appears from the record or *abunde* that the issue upon which it was rendered was upon that proposition."

The same doctrine was laid down by the supreme court in *Packet Co. v. Sickles*, 5 Wall. 580, the court, by Mr. Justice NELSON, saying:

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

"When a judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined. * * * But even when it appears from the intrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

Also, in *Burlen v. Shannon*, 99 Mass. 203 :

"It is lawful to reason back from a judgment to the basis on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion, but such an inference must be inevitable, or it cannot be drawn. These we understand to be limitations of the rule, according to all well considered authorities, ancient and modern."

Now, what was necessarily involved and decided in that former decree? The bill in that case alleged the patent, that the defendants were making lanterns, and that those lanterns were an infringement on the patent. There was a general decree dismissing the bill upon its merits. Was it necessarily involved and decided that the patent was void? Might not the decision have been that the defendants were making no lanterns? Would not the decree necessarily have been dismissing the bill upon the merits, if there had simply been a failure to prove that the defendants were making lanterns? Now, if it is uncertain upon the face of the record as to what was in fact settled and decided, how can it be said that the decree bars this suit? Of course, the extent to which a judgment or decree is certain varies very much, whether it is for the plaintiff or the defendant. Were I to bring an action for trespass, averring title and possession of a piece of real estate, and a trespass on it by the defendant, and obtain judgment, it would be necessarily involved and decided therein that I had the title and possession; for otherwise I could not have obtained such a judgment. But on the other hand, if the judgment were in favor of the defendant, it would not be necessarily involved and decided therein that I had no title, because the decision might have been upon the ground that no trespass was proven.

The famous case of *Outram v. Morewood*, 3 East, 346, in which Lord ELLENBOROUGH wrote an elaborate opinion, illustrates this. There a party sued in trespass, averring title to a mine, and trespass by defendant, and obtained judgment. In a subsequent action Lord ELLENBOROUGH held that the title to the mine was necessarily involved and decided, and therefore it was an adjudication. But if the judgment had been in favor of the defendant, it might have been either on the ground that plaintiff had no title to the mine or that there had been no trespass. There is practical good sense in that. Take the case that I put of a suit in trespass. It would be a terrible outcome if, after judgment in one case in favor of the defend-

ant, it should be held that title and possession were adjudicated against me, and that I could never thereafter maintain any action of trespass against him, no matter what subsequent trespasses he might commit.

The supreme court of the United States in two cases in 94 U. S.,—one of *Russell v. Place* and the other of *Cromwell v. County of Sac*,—have, in elaborate opinions, discussed this question, and laid down the rule as has been stated. The case of *Cromwell v. County of Sac* was this: A party brought suit upon coupons, averring that the bonds were valid; that he was a *bona fide* holder. Judgment went against him. He subsequently sued upon the bonds of the same series, and coupons taken from the same bonds as the coupons in the prior suit, averring that he was the *bona fide* holder, and that the issue was valid, and the supreme court, with one dissenting voice, affirmed that the prior judgment was no bar. So, in the case of *Russell v. Place*, 94 U. S. 606, a party in an action at law for damages for infringement of a patent recovered. Afterwards, he brought a suit in equity on the same patent, and the court held that the former judgment was not an adjudication, and did not estop the defendant in the equity suit for an injunction and accounting, because the validity of the patent was not necessarily involved in the prior case, except in respect to the claim which was the basis of recovery. There were two claims in the patent. A patent might be valid as to one claim and invalid as to the other. The sum and substance of it is that an estoppel must be certain to the very intent, so that if, upon the face of the record, anything is left to the conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.

Further, if we are to look beyond the face of the decree in this case, and gather what light we can from the opinion that was expressed upon the demurrer to a bill of review of the former decree relied on, we find, from the language of my brother TREAT, who decided that case, that the decision was upon the ground that the parties had failed to prove that the defendant made any lanterns. He says plaintiffs offered no proofs, and had none taken, tending to show any infringement by the defendants, and hence the court was bound to dismiss the bill. "It was not necessary for it," says the court, "to inquire into the validity of the plaintiff's patent, because if such patents were valid, no evidence that the defendants had infringed them was offered." It is true, he says, if he had gone into the question of the validity of the patent he would possibly have decided the same way, but that was not the basis of the decision. We are therefore constrained to hold that the pleas are not good.

Pleas overruled, and defendants ordered to answer by May rules.

HORNE v. HOYLE.¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

PATENTS FOR INVENTION—SALE—ACTION—INFRINGEMENT.

The fact that the purchaser of a patented machine has been sued as an infringer by third parties, and put to expense in making defenses, is no defense to a suit by the vendor on the contract of sale, even where that contract provides that indemnity bonds shall be given the vendee, and none have been furnished.

At Law. Suit for damages for breach of contract. Motion to strike out part of answer.

The allegations of the answer as to the guaranty, and contract to give an indemnity bond, referred to in the opinion of the court, are as follows:

"Further answering herein, this defendant says that, in and by the terms of said contract sued on in this action, it is provided and stipulated that the plaintiff herein should personally guaranty the validity of the patents under which said machine was made, and that he would furnish to this defendant indemnity bonds to save him harmless in the event of any litigation from the use of said Excelsior Electric Light plant, which plaintiff * * * agreed to furnish to this defendant under the terms of said contract; and this defendant says that plaintiff herein * * * has wholly failed * * * to furnish to this defendant any indemnity bond or bonds."

The other material facts are sufficiently stated in the opinion of the court.

George D. Reynolds, for plaintiff.

Dyer, Lee & Ellis, for defendant.

BREWER, J., (*orally*.) In the case of *Horne* against *Hoyle* there is a motion to strike out parts of the answer. The petition alleges a contract to place an electric plant in a building in this city, the performance of the contract, non-payment of part of the purchase money, and an assignment of the contract to the plaintiff. The answer in one defense avers that it was a part of the contract that the contractor should furnish an indemnifying bond, guarantying against all infringements, and that that bond was not given. Of course that states a perfect defense. It further alleges that since the putting of the plant in the building two suits have been commenced for infringement, and are pending, and that the defendant has been put to the expense of employing counsel to defend those suits. The motion is to strike out this last defense. Obviously, it should be sustained. If no bond was given, there is a perfect defense. If there was no stipulation for a bond, then it is immaterial whether defendant has been sued or not. If a bond was given, the remedy of the defendant is on that bond. *Non constat*, that neither the contractor nor the

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

plaintiff were parties to that bond or liable on it, and the averment presents simply an immaterial matter for traverse and testimony.

The motion will be sustained.

HALLIDAY and others v. COVEL.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SAW-SHARPENING MACHINES.

Claims 12, 13, and 14, of reissued letters patent No. 10,252, granted December 5, 1882, and the fourth claim of patent No. 254,869, granted March 14, 1882, for improvements in saw-sharpening machines, construed, and *held* infringed.

2. SAME—EQUIVALENTS.

The only defense in this case was non-infringement; and while it was true that defendant's mechanism was not an exact copy or reproduction of the patented machines, and there was a noticeable display of ingenuity and skill in an attempt to evade the patent, *held*, that defendant's mechanism worked out the same result as complainants', and by substantially the same means, using equivalent parts to perform the functions performed by the complainants' construction.

In Equity.

G. L. Chapin, for complainants.

Pliny B. Smith, for defendant.

BLODGETT, J. Complainant, by this bill, seeks an injunction and accounting for the alleged infringement of reissued patent No. 10,252, granted December 5, 1882, to complainant, as assignee of W. L. Covell, for "an improvement in saw-sharpening machines," and patent No. 254,869, granted March 14, 1882, to William H. Halliday, for "an improvement in saw-sharpening machines." As to the reissued patent, the original was granted May 11, 1876, but the infringement is only alleged as to claims 12, 13, and 14 of the reissue, which are substantially the claims found in the original patent.

As to the Halliday patent, No. 254,869, infringement only of the fourth claim is charged. The bill in terms also charges the infringement of patent No. 222,386, granted December 9, 1879, to W. L. Covell, and assigned to complainant; but this charge in the bill was not pressed, and no claim was made under it at the hearing. Both patents in controversy pertain to machines for sharpening saws, in which the saw and the grinding wheel are brought in contact automatically. It is shown by the proof that saw-sharpening machines were used before any of these devices were invented; but it is contended by complainant that a difficulty was encountered in all the older machines from the fact that as the teeth in the same saw are not of equal length, therefore no reliable automatic adjusting feed had been obtained be-

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

fore the Covel patent, and that the chief merit of this device is in overcoming this difficulty, and in making a mechanism which shall automatically sharpen the teeth of the saw, without further attention, by bringing the teeth in contact with the grinding wheel. The chief feature of the Covel device is the latch-feed, by which the pawl or dog-feed acts upon the tooth of the saw next after the one to be ground, to bring the tooth to be ground in contact with the grinding wheel, and the claims of the patent in controversy here all refer to this feature of the mechanism, and the parts by which it is operated. These claims are:

"(12) The combination of the latch-feed, *i*, and screw-threaded pivoted bolt, *c*, and a suitable guide, as shown, and for the purpose described. (13) The combination of a sliding-block and screw-rod, *d*, lever, *e*, piston, *f*, and crank-shaft, *g*, as and for the purpose set forth. (14) The combination of a latch-feed with a pivoted lever, *j*, pitman *k*, rock-shaft, *o*, crank *m*, *m*, tappet, *p*, and crank, *l*, as and for the purpose described."

The special features of the Halliday patent, No. 254,869, are an oscillating device which operates, with a tilting frame, to bevel the edges of the saw-teeth during the sharpening process, and a continuous cam, which co-operates with the tilting frame, and the oscillating support to the grinding wheel, to secure the movement by which the beveling is done. The claim of this patent in controversy is the fourth, which is as follows:

"(4) The tilting frame, 2, 3, 4, and *m*, in combination with the continuous cam, *l*, a supporting frame, 16, and *m*, a wheel, *f*, with the feed devices, *s*, *r*, *t*, and *x*, as and for the purpose specified."

The only defense relied upon is non-infringement. After careful consideration of the proofs, I am satisfied that the defendant's machine embodies in its construction and mode of operation the principle of the reissued Covel patent as to its feeding device, and the Halliday patent as to its mechanism for tilting the grinding wheel. It is true the defendant's mechanism is not an exact copy or reproduction of the machines described in the patent. There is, in fact, as there often is in infringing machines, a noticeable display of ingenuity or skill in attempting to evade the complainants' patent, but the defendant's mechanism works out the same result as the complainants', and by substantially the same means, using equivalent parts to perform the functions performed by the elements of the complainants' construction.

There may be a decree prepared finding the defendant infringes the two patents as charged, and for an accounting.

BUTLER and others v. STECKEL and others.¹*(Circuit Court, N. D. Illinois. March 22, 1886.)*

1. PATENTS FOR INVENTIONS—BRETZEL-CUTTERS.

Letters patent No. 274,264, granted March 20, 1883, to Butler, Earhart & Crawford, for a bretzel-cutter, is void for want of patentable novelty.

2. SAME.

The prior art disclosing the use of flat dies for cutting dough into various forms, such as the letter "B" and character "&," and provided with scrap passages and expelling studs, *held*, that there was no patentable novelty in the dies of the patent, which were simply modified to cut dough into the shape of a hand-made bretzel, and combined with the old expelling studs.

3. SAME—EXPERIMENT—MECHANICAL SKILL—INVENTION.

Although the production of the patented device may have required study, effort, and experiment, *held*, that only mechanical skill was required to produce it, and hence that there was no invention.

4. SAME—INVENTION, WHAT IS NOT EVIDENCE OF.

The mere fact that others in trying to accomplish a given object had long wandered by the wrong path, is not evidence that invention was required to accomplish what patentee did by taking the direct path.

5. SAME—MERIT OF PATENTEES.

The merit of these patentees seems to have been in overcoming a prejudice against machine-made goods, and not in the invention of any radically new process for making the goods by machinery.

*Frank Baker, Edson Bros., and Hill & Dixon, for complainants.
Banning & Banning, for defendants.*

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of letters patent No. 274,264, granted March 20, 1883, to the complainants, for a "Bretzel-cutter." In their specifications the patentees say:

"This invention relates to an improvement in moulds or dies for stamping or cutting out bretzels, having for its object more especially to cause the product or bretzel to have the appearance of a hand-made bretzel; and it consists in the peculiar construction of the mould or die to effect this result, and other details of construction, substantially as hereinafter more fully set forth.
* * * In carrying out our invention, we construct the die after the fashion or configuration of the ordinary bretzel, in its general shape."

The bretzel has heretofore been chiefly made by rolling out a strip of dough, and bending it into nearly a semi-elliptical or heart shape, and crossing the ends, and laying them upon the outer rim of the circle. This form leaves, of course, three interior openings, and in cutting the bretzel from the sheet of dough as it passes under the cutter provision must be made for the interior scrap which is cut from the dough, and this is done by having an opening extending through the plate and cutting dies so that the interior scrap is carried off through the tubes connected with these openings.

The patent contains three claims, as follows:

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

(1) A flat die for cutting bretzels, having the bow, *a*, the loop *a*¹, *a*¹, the intermediate twisted portion and the end, *a*³, *a*⁴, and provided with the central creaser, *a*⁶, the side creasers, *a*⁵, *a*⁵, and the end creasers, *a*⁷, *a*⁷, projecting into the bow, substantially as shown and described. (2) In a bretzel cutter the combination of the die, *A*, perforated as described for the reception and passage of the scraps, and for the expelling studs, *F*, with said studs, the guide-rod, *C*, the base, *B*, provided with feet or projections, *b*¹, the spring, *b*, perforated plate, *D*, and the hand-piece, *E*, substantially as shown and described. (3) A flat bretzel-shaped die, having three off-bearing internal scrap passages or channels, and perforations for the expelling studs, in combination with the expelling studs, substantially as shown and described.

The defenses are (1) that the device has no patentable novelty; (2) prior use.

The proof shows that it is old in the art connected with the preparation of food, to cut crackers, cookies, and cakes of various sorts into many shapes, including the shapes of animals, and shows the use, for at least 10 years before the application for the patent in question, of dies in bakeries for cutting cakes in the shape of the capital letter "B" and the character "&," with two or more scrap passages; and with dies of this character in public use, I cannot myself see any patentable novelty in the dies of the patent. They are simply made to cut a piece of dough in the shape of a hand-made bretzel, while the dies offered by the defendant as anticipating the complainants' dies cut pieces of dough into forms corresponding with the letter "B" and character "&" from which the internal scrap must be removed. These old dies also show expelling studs, by which the cut figure is expelled or pushed out of the die after being cut, performing the same function that is performed by the expelling studs in the patent. It is true, I doubt not, that it required considerable mechanical skill to make a die which would cut a bretzel from dough so as to imitate a hand-made bretzel, because the hand-made bretzel is somewhat clumsily shaped, as the parts are bent, twisted, and laid upon each other, and it was undoubtedly a matter requiring some study, effort, and experiment to make the shape of the die correspond with the external formation of the bretzel. This, however, seems to me not to involve invention, but mere mechanical skill. The cutter might be compelled to experiment some,—that is, cut several dies,—but that is not invention.

The proof also shows that a large number of persons, before these patentees, had attempted to make a machine which would cut bretzels, and considerable money and time seems to have been expended in efforts to produce such a machine; but the noticeable thing in regard to all these early efforts was the fact that most of those engaged in them were trying to draw out and twist the dough by machinery, rather than to cut or stamp dough from a flat sheet, while others were endeavoring to cut them with dies set in revolving cylinders; and as soon as the idea of cutting the dough from a flat sheet was conceived the difficulty seems to have vanished, and success followed

the effort, as the only change made was to adapt the old letter dies to the shape of a bretzel. Why men should have groped so long in the effort to make a bretzel-cutter or bretzel-machine, with the ordinary cake cutters before them, it is difficult to understand, but the proof shows that they did so; but I cannot see that the mere fact that others were so long wandering by the wrong path is any evidence that it requires invention to accomplish what has been done by taking the direct path pursued by these patentees. All they had to do was to make the die, and adopt the old form of cutting dies used in bakeries for many years; and the result seems to have been accomplished. It seems to me, from the proof, that inasmuch as the bretzel is an article of time-honored history in the German countries, connected to some extent with the older religious observances of those people, and intimately with their present social enjoyments, that in the first efforts at making them by machinery it was assumed that they must in every respect simulate those made by hand or they would not be acceptable to the public; that they must not only simulate them in appearance, but the manipulation of the dough must be substantially the same as in those made by hand; but when the machine-made bretzels were introduced to the public, and accepted in place of the hand-made article, the problem was solved; and the merit of these patentees seems to me to have been in overcoming a fixed prejudice in favor of the hand-made goods rather than in inventing any radically new process for making the same goods by machinery.

The finding will be that the patent is void for want of novelty, and the bill dismissed.

KIRBY v. THAMES & MERSEY INS. CO., Limited.

(*District Court, E. D. Wisconsin. April, 1886.*)

1. MARINE INSURANCE—INSURER'S LIABILITY TO UNINSURED PART OWNER FOR NEGLIGENCE.

Where an insurer has insured the interest of a half owner of a vessel; and the vessel was stranded during a voyage; and such half owner requests the insurer to render her assistance; and the insurer sends an agent to the vessel with instructions "to render such assistance as is necessary;" and such half owner notifies the insurer that he abandons his interest in the vessel to the insurer; and such agent, with the aid of the master, crew, and such half owner, move the disabled vessel to a harbor; and afterwards, without further orders from the insurer, such agent, the master, and crew, with the aid of such part owner, attempt to navigate the vessel to her home port, which is also her port of destination; and during the voyage the vessel is lost: *held*, that the insurer is not liable to the owner of the uninsured half interest in the vessel for her loss, and is not, as to him, chargeable with negligence.

2. SAME—RIGHT OF PART OWNER TO ABANDON UNDER INSURANCE POLICY.

Where a policy of insurance on the interest of a part owner of a vessel pro-

¹Reported by Russell H. Cartis, Esq., of the Chicago bar.

vides that the insured shall not have a right to abandon unless the amount, which the insurer would be liable to pay under an adjustment as of a partial loss, would exceed half the amount insured, nor unless the insurer would receive a perfect title to the subject abandoned, *intimated*, that a notice of abandonment by the insured to the insurer, before the facts which affect the right to abandonment are ascertained, does not constitute an abandonment under the policy.

8. SAME—ABANDONMENT BY PART OWNER DOES NOT AFFECT CO-OWNERS—MASTER'S DUTY.

Abandonment by one part owner of a stranded vessel of his interest in the vessel to the insurer of such interest does not affect the interest of other part owners, nor the master's control over the vessel, so far as their interest is concerned.

4. SAME—AGENCY—EXTENT OF WRECKING MASTER'S AUTHORITY FROM INSURER.

Authority by an insurer to a wrecking master to render "necessary assistance" to a stranded vessel does not confer on such agent any authority to accept an abandonment of a part owner's interest, nor authority to navigate the disabled vessel to her home port after having once moved her into a harbor.

5. SAME—WEIGHT OF EVIDENCE ESSENTIAL TO RECOVERY.

Libelant must, to recover, clearly prove his case.

Markham & Noyes, for libelant.

Van Dyke & Van Dyke, for respondent.

DYER, J. The libelant, Kirby, and one Ebert, were owners of the schooner Arab, a vessel engaged in lake navigation, each owning an undivided one-half interest. Ebert was managing owner, and his interest was insured in the sum of \$2,000, under a policy issued by the respondent company. The libelant's interest was uninsured. About the first November, 1883, the vessel was stranded near the harbor of St. Joseph, Michigan. The master, Capt. Charles Starke, immediately telegraphed to Fitzgerald & Co., the local agents of the insurance company, at Milwaukee, that the vessel was ashore, and requesting assistance. Fitzgerald & Co. at once telegraphed Crosby & Dimick, general agents of the company at Buffalo, saying that help could not be sent from Milwaukee, and that it could be better obtained in Chicago. Crosby & Dimick then forwarded a dispatch to the agents of the company in Chicago to send Martin Blackburn to the vessel, "to render such assistance as was necessary." Blackburn was immediately engaged, and proceeded to St. Joseph. He procured a tug and pumps. Part of the cargo was removed from the vessel, and placed on the pier, and within a few days she was got off, and was taken into the port of St. Joseph. Ebert and the master and crew of the vessel took part in the wrecking operations. On the sixth of November, and before the vessel was got off the beach, Ebert sent a telegram to the Buffalo agent, stating that he abandoned his interest in the vessel to the insurance company. This telegram was written by Blackburn for Ebert. On the same day Ebert sent a similar telegram to Fitzgerald & Co., the local agents at Milwaukee. The proofs show that the Buffalo agents never received the telegraphic notice of abandonment alleged to have been sent to them by Ebert; but Fitzgerald & Co., on the receipt by them of notice of abandon-

ment, forwarded it by mail to the Buffalo agents, who received it some time after the 6th. The schooner was taken into the harbor at St. Joseph, probably on the 9th. Sails were put under her to stop her leaks and keep her afloat, and some portion of that part of the cargo which had been previously taken off was placed again on board. Ebert and the master and crew took part more or less in this work. Milwaukee was the home port of the vessel, and was the port of destination of both vessel and cargo when she was driven ashore. On the evening of the 10th the tug, with Capt. Blackburn on board, took the vessel in tow, accompanied by her master and crew and a sufficient force to keep the pumps in operation, and set out for Milwaukee. The voyage was prosecuted successfully until about 4 o'clock the following morning, when the vessel became suddenly water-logged, and was lost. This suit is now brought by the libellant, Kirby, to recover from the insurance company the value of his one-half interest in the vessel, on the ground that in these transactions Capt. Blackburn was the representative and agent of the company, exercising control over the vessel; that he was guilty of gross negligence in attempting to take her across the lake when she was in an unseaworthy condition, and that in consequence of such negligence she was lost.

I cannot doubt that Capt. Blackburn, in his operations for the relief of the vessel, and down to the time when she was taken into the port of St. Joseph, was acting as the representative of the insurance company. This appears outside of testimony which was objected to, such as his own statements on the subject, which I rule incompetent. He went to the scene of the wreck at the instance of the general agents of the company who designated him specially for the employment, and he was accordingly employed by the local agents in Chicago to render such assistance to the vessel as was necessary. The insurance company was interested in the rescue of the vessel, because it had issued a policy covering Ebert's interest; and all parties seem to have co-operated in the service, for the purpose of protecting from loss the interests of the respective parties, including that of the libellant, Kirby.

It seems to me, also, that after Crosby & Dimick received from Fitzgerald & Co. the notice of abandonment sent in the form of a telegram by Ebert, on November 6th, the insurance company might very properly, so far as Ebert's interest was concerned, assert the right to look after and protect that interest. Whether it was a technical abandonment, under an absolute right to abandon, is doubtful. The policy provided that the insured should not have a right to abandon, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured; nor was any abandonment to be valid unless it should be efficient to convey to, and vest in the insurance company an unincumbered and perfect title to the subject abandoned; and the

facts bearing upon these conditions in the policy, and which affected the right to abandon, were not then ascertained.

I regard it extremely doubtful whether, under any authority Blackburn had from the insurance company, he could act for the company so as to make it liable for the consequences of his negligence, after the vessel was brought into the port of St. Joseph. He was a wrecking master. His instructions were simply to go to the assistance of the vessel; and when he got her off the beach, and safely into port, it would seem that his authority ceased, and that, without further authority, what he might thereafter do, especially if he proposed to take the vessel, in a disabled condition across the lake, would be done upon his own responsibility, so far as the company was concerned. In a case like this, where it is sought to charge one party with damages resulting from the negligence of another, it ought clearly to appear that the act out of which the alleged liability springs was within the scope of the latter's authorized employment. The company does not appear to have given Blackburn any authority to take possession of the vessel, or to do anything with her except to assist in relieving her from the immediate extremity she was in. He had no authority to accept an abandonment. He received no instructions from the company to take her out of St. Joseph harbor, or to take her to any other port for repairs. If the determination of the case turned upon this question, I should be strongly disposed to hold that after the wrecking service was completed, and the vessel brought into port, Blackburn's relation to the company, as its representative, ceased, and that in what was subsequently done he acted on his own responsibility, and rather in the capacity of an independent salvor than as the agent of the company.

Even if Blackburn were to be regarded as the company's agent, acting within the scope of his employment, down to the time the vessel was lost, it is not altogether clear that such negligence was imputable to him in attempting to take the vessel to her port of destination as would make the company liable for her loss. If he acted in good faith, but erred in his judgment as to the success of the undertaking, it might not follow that such error of judgment alone should involve his principal in a liability to damages, the same as if the loss had been occasioned by positive negligence. The law does not judge the facts in such a case with all the wisdom that comes after the event, but rather in the light of the circumstances and situation as they appeared at the time to those charged with negligence. However this may all be, upon an attentive perusal of the testimony, and upon consideration of all the circumstances of the case as I am enabled to judge of them in the light of the evidence, I am well convinced that the attempt to take the vessel to the port of Milwaukee was made, not alone upon the individual responsibility of Capt. Blackburn, but with the consent and acquiescence, and in accordance with the expecta-

tion, of both Ebert and the master of the vessel. Although both of these parties seek to place the entire responsibility of the attempted voyage across the lake upon Blackburn, it is quite evident that they co-operated in the preparations for that voyage, and the circumstances strongly point to the conclusion that they expected and desired the vessel to be taken to the port of Milwaukee, which, as before observed, was the port of destination of both vessel and cargo. To my mind, in view of all the circumstances, it is hardly credible that Blackburn, *without any interest so to do*, would, of his own independent will, take the vessel across the lake. He had no instructions from the insurance company which authorized it. No fact is disclosed which would naturally prompt him to do it, in the absence of a desire and expectation on the part of the master of the vessel that it should be done.

The alleged abandonment did not transfer the managing ownership to the insurance company. If there was a valid abandonment, it was only of Ebert's interest. The other half interest owned by the libelant was unaffected by the abandonment, and the surrender by Ebert to the company of his interest did not determine the master's duty or authority, so far as the libelant's interest was concerned. He still owed allegiance to the vessel, as the representative of the libelant's interest in the existing emergency. His authority had not been countermanded or withdrawn by the libelant, who knew the vessel was in distress. The duty of the master, and his right to a voice in the control of the vessel in behalf of the libelant's interest, after she was got into port at St. Joseph, still remained; and, so far as anything is here disclosed, he could not be legally dispossessed of that right by Blackburn; nor could Ebert, by any directions to the master after the alleged abandonment, legally authorize or instruct him to abdicate his functions as master in favor of Blackburn, so far as the libelant's interest was concerned.

As I have said, the circumstances tend strongly to prove the concurrence of the master in the proposal to take the vessel to Milwaukee. It was for his interest and the interest of the party he represented, that this should be done. He says everything was done under the directions of Blackburn and that the vessel was not fit to cross the lake, and yet he made not the slightest objection to the voyage. He undoubtedly expected that the vessel would be taken to her home port; and, indeed, he says in his testimony that when they were sheathing her with the sail, and putting part of her deck load again on board, he knew she was going across the lake. His statement, in another connection, is: "I knew she was not going to stay there, because she could not be rebuilt there; or perhaps she could, but it cost a good deal more." When asked when he first learned the vessel was to be taken out of St. Joseph, he seems to repeatedly evade the question, and says he was at supper when he first learned "the particular place to which she was bound." Finally he says:

"I always had an idea she would be taken to Milwaukee," and that he understood that when she was got off the beach she was to be taken there. He and the crew assisted in the work done preparatory to the voyage, and it is not reasonable to suppose, if he thought the vessel "was not fit to cross the lake," that he, with his entire crew, would have gone aboard, without objection, to make the voyage. In his examination these questions are asked, and answers given:

"*Question.* You didn't know anything about it, then, [referring to the proposed voyage across the lake] when you put the light lumber in her during that afternoon? *Answer.* Well, I knew that they would not rebuild her in St. Joseph; but I didn't know exactly where she was going, because I didn't ask. *Q.* Then, you knew all the time that she was not to be repaired at St. Joe; but was to be taken across the lake to be repaired? Was that it? *A.* Well, I thought she would have some repairs, but I knew she was not going to be rebuilt there."

That the master deferred to Blackburn's judgment is highly probable, but that he surrendered his position as master, and also the uninsured interest of the libellant in the vessel, seems to me very improbable. On the contrary, various out-croppings in the testimony, and the circumstances of the affair, lead me to think that he concurred and assisted, not alone in the efforts made to release the vessel from her extremity, but in all the preparations to take her across the lake, without objection or dissent, and that he so acquiesced, in the belief and with the understanding, that he was thereby promoting the interest of the libellant, whom he still represented.

It also appears that Ebert was more or less active in the preparations which preceded the attempt to cross the lake. He placed the sail under the vessel, put the hoistings inside the canvas, remained with or near the vessel while the work was in progress, and saw her leave St. Joseph without dissent or objection. He claims that before rendering assistance he asked Blackburn if he should do so, which, under the circumstances, seems very improbable. He says that the day Blackburn came to the relief of the vessel he told him to take her to Milwaukee, and that he thought if they could get her right off "it would not hurt to take her." The cargo belonged to his father-in-law, was consigned to Milwaukee, and he made no objection to so much of it as was carried remaining on board. The testimony also shows that he expended money to pay wages of seamen earned, and bills incurred after the abandonment of his interest, and I cannot resist the conclusion that all the parties contributed their best endeavors—*First*, to get the vessel out of her extremity, and *then*, to take her, with part of her cargo, to Milwaukee, her port of destination. If an error of judgment was committed, it was a mutual error. If there was negligence, it was negligence in which all shared. The master was the legal representative of the uninsured interest, participating in and consenting to the venture; and so I am of the opinion that the loss which resulted ought not to be visited upon the respondent, especially when the authority of Blackburn to employ the

vessel in navigation, even for the purpose of taking her to her home port, is not clear.

The testimony of Blackburn is in direct antagonism to that of Ebert and Capt. Starke, and although various particulars in which he is corroborated by the circumstances might be pointed out, I do not deem it necessary to extend discussion of the subject. At best, the right which the libelant asserts against the respondent is doubtful. A clear case of liability is not, in my opinion, established, and the libel must therefore be dismissed.

THE STAMFORD.¹

THE TWILIGHT.

THE STAMFORD AND THE TWILIGHT.

(*District Court, D. Massachusetts* March 18, 1886.)

1. COLLISION—FOG—VIOLATION OF TWENTY-FIRST RULE—NEGLIGENCE IN NOT HEARING STEAM WHISTLE—INJURIES TO PASSENGERS.

The steamers S. and T. came into collision in the harbor of Boston in daylight, and during an unusually thick fog. Both vessels, at the time of the collision and previously, were running at as slow a rate of speed as their engines would admit of. Prior to the disaster they had been approaching each other from almost directly ahead. The S. heard the whistle of the T. when the latter was about one-half a point on her port bow. After a short interval it was heard a second time, and almost immediately afterwards a third. Each succeeding whistle seemed to be nearer, and the sound of paddle-wheels followed the third whistle. On hearing the first whistle the S. did nothing; on the second her helm was put a-port; and at the third hard a-port. *Held*, that the twenty-first rule required that the S. should not only slacken her speed, but also, under the circumstances, stop and reverse. *Held*, that the T. was also in fault in not hearing the whistle of the S., and also in proceeding ahead under the circumstances.

2. SAME—RIGHT OF INJURED PASSENGER TO DECREE.

Held, also, that a passenger on board of the S., who, while exercising due care, had been injured by the collision, was entitled to a decree against both vessels.

The first two of these cases were cross-libels for a collision between the steamers Stamford and Twilight. The third was a libel by Catharine E. Frederickson, a passenger on the Twilight, against the Stamford and Twilight jointly, for personal injuries received in the same collision. It was admitted at the hearing, on the part of both vessels, that the libelant in the third suit was in the exercise of due care, and was entitled to a decree in her favor for her full damages if the court should be of opinion that the accident was caused by the fault of the vessels.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Frederick Dodge and Edward S. Dodge, for the Stamford.
L. S. Dabney and E. N. Hill, for the Twilight.
W. A. Munroe, for Catherine E. Frederickson.

NELSON, J. This collision between the steamers *Stamford* and *Twilight* occurred in Boston harbor, in an unusually thick fog, at half past 5 o'clock of the afternoon of August 19, 1884. The fog had prevailed during the whole day over all the harbor below Governor's island, and for some distance into the bay, making the navigation extremely difficult and dangerous. The *Stamford* was a passenger boat running regular daily trips between Boston and Plymouth. She left her wharf in Boston at 10 A. M., with some 300 passengers on board, and arrived off Plymouth harbor; but, finding it unsafe to attempt to enter on account of the fog, she turned about, and at the time of the accident was on her way back to Boston. She was running up the channel at half speed, sounding her whistle at frequent intervals, and had arrived nearly opposite No. 6 buoy, on the Lower Middle shoal, when her master heard a whistle which seemed to come from about half a point on her port bow. After a short interval he heard the whistle repeated from the same direction, nearer, and immediately after that a third whistle, and the sound of paddle-wheels in the water, still nearer. At the first whistle he did nothing. At the second, he ordered the wheel to be put to port, and on hearing the third whistle, and sound of paddle-wheels, he ordered it to be put hard a-port, the whole effect of the two orders being to change the course of the boat to starboard two points. When the approaching vessel, which proved to be the *Twilight*, came in sight through the fog, it was apparent that a collision could not be avoided, and, with a view to ease the blow by lessening the angle of contact, he ordered the wheel to be put hard to starboard.

The *Twilight* was also a passenger boat, plying regularly several times a day between Boston and Nantasket. She left her wharf in Boston at 5 P. M., in clear weather, with a large number of passengers on board, and proceeded down the harbor for Nantasket at full speed. At the Upper Middle shoal she struck the fog, and was then slowed down to one bell. At buoy No. 9 she was run into by the steamer *John Brooks*, and by this collision a deep gash was cut in her guard on the port side, at the forward gangway. After extricating herself from the *John Brooks*, she again started up at full speed. After this her engines were stopped twice; the first time to haul in a hawser which had dropped overboard in her encounter with the *John Brooks*, and the second time because her master began to have doubts whether it would be safe to continue on in the fog. He concluded, finally, however, to go on, and the engines were again started. Before she had attained full half speed the *Stamford* was seen and reported on the port bow. The *Twilight's* engines were stopped and her wheel put hard to port as quickly as possible, but the col-

lision was then inevitable. The fog whistle of the Twilight was sounded regularly from the time she entered the fog. Her master and pilot were in the pilot-house, and the mate was forward on the look out; but none of them heard the Stamford's whistle, or any other sound of her approach before she came in sight. The Twilight struck the Stamford a little aft of her forward gangway, carrying away the whole port side of the latter outside of her hull, including the paddle-box and paddle-wheel. The Twilight also sustained considerable injury, but less than the Stamford.

A large part of the testimony on each side was directed to prove that immediately before the collision the opposing boat was running at full speed. But I am satisfied this was not the case as to either boat. Each boat was running with the steam close shut off, and was going at as slow a rate as her engine would admit of without coming to a full stop. This appears from the testimony of the engineers and other officers on the respective boats, and is confirmed by other witnesses on each side, as well as by all the surrounding circumstances. To run at full speed in such a fog, in a narrow and crowded channel, with the boats loaded with passengers, would be navigation of the most reckless kind. I do not believe the management of either of these boats was of this character. It is true, the tide was with the Stamford; but with her slow progress through the water, she could have made no allowance for that without stopping or drifting, which she was not bound to do. Nor should fault be attributed to her for starboarding. It had the effect to throw round her stern, and bring her course more nearly parallel with that of the Twilight, and thus to lessen the direct force of the blow, and it was done with the honest purpose of escaping greater disaster.

But upon other grounds I am of opinion that both vessels should be held responsible for the collision. By the twenty-first rule, then in force, a steam vessel, when approaching another vessel so as to involve risk of collision, was required to slacken her speed, and, if necessary, stop and reverse. The Stamford was in such a situation, in respect to the Twilight, that this rule was applicable to her. Perhaps she was not bound to stop at the first whistle; but at the second it was plainly her duty to stop and reverse. The successive whistles clearly indicated that a steamer was nearing her rapidly from almost directly ahead, and that the risk of collision was imminent. Her master had only his sense of hearing to inform him of the dangers in his path. Instead of heeding the warning and stopping his boat, which, as a prudent officer, he should have done, he contented himself with merely porting. This was a plain violation of the rule, and was one cause of the disaster.

The officers of the Twilight were at fault for not hearing the Stamford's whistle. It was heard by at least three of the passengers. The sea was smooth, and what little wind there was, was blowing from the direction of the Stamford. An attempt was made on the

part of the *Twilight* to prove that the *Stamford's* whistle was of insufficient power. But I think this failed. Their failure to hear it was undoubtedly owing to the disorder and confusion on board, caused by the collision with the *John Brooks*, and the efforts to recover the hawser. The *Twilight* had no right to proceed until order was restored, and the officers had regained their coolness and self-possession. For this reason I hold her also at fault.

In the first two cases interlocutory decrees are to be entered for the libelants, the damages to be divided. In the third case an interlocutory decree is to be entered for the libelant against both vessels. Ordered accordingly.

EDGERTON v. THE MAYOR, etc.¹

District Court, S. D. New York. April 5, 1886.

1. COLLISION—OPEN DRAW—VESSEL APPROACHING AT ANGLE—FAULT.

When a tug, with a float, attempted to pass through a draw-bridge on the Harlem river, but did not approach the draw in line with the opening, and the pilot-house of the tug struck the end of the draw, *held*, that the tug was in fault.

2. SAME—ENGINEER OF DRAW—DUTY—CONTRIBUTORY NEGLIGENCE.

The engineer of the draw perceived that the tow was approaching upon an angle, but made no effort to favor its passage by revolving the draw beyond the middle line, as was the custom to do when necessary. *Held*, that failure to perform this simple and customary duty was contributory negligence on the part of the engineer.

3. SAME—CITY CORPORATION—DEPARTMENT OF PARKS—STATE COURT ADJUDICATION.

The state courts having held that the corporation is liable for any negligence in the management of streets or bridges under the department of parks, such adjudication should be followed by this court.

4. SAME—DRAW-BRIDGE—DUTY OF CUSTODIANS—NEGLIGENCE OF SERVANT—LIABILITY.

The duty to take proper care of a bridge includes the duty to make proper provision for the passage of vessels through the draw. The custodians of the bridge are bound to the use of ordinary diligence to avoid accidents to vessels going through the draw in a customary manner, as one of the incidents of the management of the bridge. They are therefore responsible for the want of ordinary care on the part of their servants.

In Admiralty.

Alexander & Ash, for libelant.

E. H. Lacombe and *F. W. Hinrichs*, for respondents.

BROWN, J. At about 8:30 A. M. on the twenty-fourth of February, 1884, as the steam-tug *James A. Langton*, having float No. 4 lashed on her starboard side, was going up the Harlem river with the flood-tide, in attempting to pass through the eastern passage of the open draw of the Third-avenue bridge the pilot-house of the tug struck the

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

corner of the draw, causing various items of damage, for which this libel was filed. The tug was about 70 feet long by 19 feet beam; the float, 190 feet long by 34 feet beam. The bridge is 55 feet wide. The whole span of the draw, which revolves on its center so as to open two passages for vessels, is about 212 feet long; and when it is fully open, each passage-way for vessels is $78\frac{1}{2}$ feet in the clear. The abutment on the New York side is 134 feet long; that on the Westchester side, 212 feet; making the whole length of the bridge 490 feet. The whole width of the tug and tow was about 53 feet.

The libelant contends that the draw was not open by some 10 or 15 feet, and that that was the cause of the collision; that he came up the river in line with the east passage, and headed directly through it; and that the float went within three or four feet of the Westchester side. The respondents' witnesses allege that the draw was open exactly true; that the tug and float came up along the westerly or New York side of the river, and appeared to be designing to go through the west passage of the draw; but that when near the bridge they sheered to the eastward, attempting the east passage, and thus threw the boats quartering upon the corner of the draw, rendering the collision inevitable.

I am satisfied that the truth lies between these two accounts. It would have been impossible for the tug, if heading for the western passage, when within 250 or 300 feet of it, as the respondents' witnesses allege, to have turned so cumbersome a float 134 feet to the eastward, so as to enter the eastern passage at all. The tide was running flood at the rate of some three miles an hour, and the boat, though under a slow bell, must have had some considerable headway, or she could not have been steered at all, nor have crossed from one passage to the other. A disinterested witness, standing on the dock about 700 feet below the bridge, testified that the tug and float seemed to be about in mid-river, heading for the east passage. The east passage, however, was from two-thirds to three-fourths of the distance across the river; so that if this witness' statement is to be accepted, the tug and float were not heading directly up river, but must have been heading to the eastward, so as to reach and pass through the eastern passage. To this extent the evidence of the respondents is therefore partially corroborated, although the distance was much greater than they state. The east passage was some 25 or 26 feet wider than the tug and float. Had they been heading from below in a straight line for the east passage, and gone, as the captain says he did go, within three or four feet of the east abutment, they would have cleared the other side by over 20 feet, and the corner of the draw must have been nearly 25 feet less than fully open in order to have struck the pilot-house,—a distance nearly double the distance estimated by the libelant's witnesses.

From these considerations I am satisfied that the tug and float did not approach the draw in line with the opening, as they might and

should have done; but that they approached it somewhat upon an angle, and must be held in fault for doing so when nothing constrained them. The tide there flows about true, and they could not have been deflected by currents.

On the part of those in charge of the bridge, it is clear from the evidence that they had abundant notice of the approach of the tug, and abundant time to give her all available space. The engineer thinks that he had the draw open one or two minutes before the collision. He saw she was coming upon an angle, but made no effort to favor her passage by revolving the draw beyond the middle line, as he testifies it was the practice to do when necessary. The open draw extended some 79 feet down the river. There were no guards beneath of any kind to protect vessels approaching it, such as exist in many cases. Reasonable consideration for the safety of vessels going through such a passage, where the tide is so strong, would seem to demand that such guards should be constructed corresponding with the open projection. But, without determining that point here, it seems clear that where no such guards exist, and where the tide is strong, and the vessel is seen approaching upon an angle, and likely to hit the edge of the draw if it be not moved, ordinary care demands that the draw be moved further in order to avoid accidents. The evidence shows that there was abundant time to do this, and that it might have been done with the utmost ease. Failure to perform this simple and customary duty must be held contributory negligence on the part of the engineer. The mode of collision shows that had the draw been moved a few feet further the collision would not have taken place. Both parties, upon the facts, must be held to have contributed to the collision; and the libellant is therefore entitled to one-half of his damages and costs, provided the corporation respondent is answerable for the neglect of the engineer to open the draw further.

2. I deem it unnecessary to consider here the somewhat nice distinctions which have been made in the several cases decided in the court of appeals in this state as regards the liability of a city corporation for the negligent acts of the servants employed under its different heads of departments as constituted by law. As respects negligence by the employes of the department of public charities and correction, of the fire department, and of the board of education, it has been adjudged that the corporation is not liable. *Maximilian v. Mayor, etc.*, 62 N. Y. 166; *Smith v. City of Rochester*, 76 N. Y. 506; *Ham v. Mayor, etc.*, 70 N. Y. 459. The first of these cases was followed by this court in the case of *Haight v. Mayor, etc.*, 24 Fed. Rep. 93. In the same case, however, FOLGER, J., says, page 170:

"The duty of keeping in repair streets, bridges, and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied acceptance of the power, and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act."

The Harlem bridge was declared by statute to be a public highway, the care and custody of which devolved by the act of 1857, c. 774, upon the counties of New York and Westchester. By the laws of 1871, c. 574, the custody and control of the bridge passed to the department of parks, one of the departments of the respondents; and when, in 1873, the south-east portion of Westchester county, including the territory about the bridge, was annexed to the city of New York, the exclusive control of the bridge passed to the department of parks, in precisely the same manner as that department had the care and control of the streets in the upper parts of the city, and in the annexed territory. In the recent case of *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, the corporation was held answerable for an injury to the plaintiff through negligence in the care of the streets in the annexed district in charge of the department of parks. The court say, (page 272:)

"It is the duty of the city to keep its streets in repair, and that duty as to all the streets in the annexed territory is devolved upon the park commissioners. It is a duty which they discharge, not for themselves, not for the public generally, but for the city. The duty is not taken away from the city. It is still bound to discharge the duty, and the park commissioners are the agency through which it discharges it."

There can be no distinction in the obligations of the city as respects their care of the streets, and their care of the bridges that are declared by statute a public highway. The court of appeals, moreover, in the case last cited, cite with approval the case of *Richards v. The Mayor*, 16 Jones & S. 315, where the city was held answerable for an injury happening through a defect in a bridge which, like the present, was under the control of the department of parks. These cases seem to me to be equivalent to an express adjudication by the state courts that the corporation is liable for any negligence in the management of streets or bridges under the department of parks; and as an adjudication upon the relation of that department to the corporation under the state laws, it must be adopted and followed by this court.

The duty to take proper care of a bridge includes the duty to make proper provision for the passage of vessels through the draw. The waters of the Harlem river are public navigable waters of the United States. In constructing the bridge with a draw, and in undertaking to open and manage the draw so as to allow vessels to pass, the state and the city have recognized the right of vessels to pass through without any appeal to the national authority to protect that right. *People v. Saratoga, etc., R. Co.*, 15 Wend. 113, 134, 136; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; S. C. 2 Sup. Ct. Rep. 185; *Milner v. Mayor, etc.*, 109 U. S. 385, 393; S. C. 3 Sup. Ct. Rep. 228. Having thus recognized the rights of commerce, and undertaken to provide accommodations for the passage of vessels, the corporation is bound that the custodians of the bridge shall use ordinary diligence

to avoid accidents to vessels going through the draw at customary hours, and in the customary manner, as one of the incidents of the care, management, and control of the bridge itself. It is responsible, therefore, for the want of ordinary care and diligence in its servants, and for the consequent damage.

Both parties being found in fault, the libellant is entitled to one-half his damages and costs, and an order of reference may be taken to compute the amount, if not agreed upon.

In re THE GARDEN CITY.¹

(*District Court, S. D. New York. April 10, 1886.*)

**ADMIRALTY—PRACTICE—COSTS—FILING PETITION—LIMITATION OF LIABILITY
ACT—DELAY—STATE COURT SUITS—TERM FEES—WITNESS FEES.**

Fifteen months after one suit, and eleven months after a second suit, had been begun in a state court against the owners of the ferry-boat Garden City, proceedings to limit liability were taken; and when the cases were ready for trial, and witnesses were present, further proceedings in the state court were stayed by injunction issuing from this court. The Garden City was held chargeable with negligence by this court on the same issue of fact joined in the suits in the state court. On motion for an order directing that claimant's costs, incurred in the state court suits before the petition to limit liability was filed, be allowed as part of the damages recoverable, *held* that, as petitioners, after the commencement of the second suit in the state court, were legally in the same situation as when they filed their petition nearly a year afterwards, they should equitably pay the charges accruing after a reasonable time to file the petition, as incident to the claimant's loss and injury, which had accrued in the mean time, and which would have been avoided by the more prompt filing of the petition. Claimant's term fees in the state court and witness fees were therefore allowed against the petitioners.

In Admiralty.

Shipman, Barlow, Laroque & Choate, for petitioners.

Chas. N. Judson and Samuel A. Skidmore, for claimants.

BROWN, J. The claimants, to whom damages were allowed in the above proceedings, have applied to the court for an order directing that their costs, or a part of their costs, incurred in the suits in the state court before the petition was filed, shall be allowed as part of their damages. These expenses are asked for on account of the long delay of the petitioners in filing their petition to limit liability, during which these costs became chargeable, and upon the authority of the following paragraph in the opinion of the supreme court in the case of *The Benefactor*, 103 U. S. 245:

"Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded

¹Reported by Edward G. Benedict, Esq., of the New York bar.

so long as any damage or loss remains unpaid. But in a particular case relief should not be granted except upon condition of compensating the other party for any costs and expenses he may have incurred by reason of the delay in claiming the benefit of the law."

In that case the proceedings to limit liability were filed a little less than two years after the accident, and some four months after a judgment in favor of the claimants for damages and costs in the district court, and after an appeal to the circuit. In the present case the petition was filed about 16 months after the accident, about 15 months after the commencement of the first suit in the state court, and 11 months after the second suit in the state court. When the cases were ready for trial, and witnesses were present, further proceedings therein were stayed through an injunction obtained from this court, upon the petition filed shortly previous. As this court, upon the same issue of fact joined in this case, has found the Garden City chargeable with negligence, it must be assumed that the plaintiffs in those cases would have recovered a judgment, including their costs, as well as damages, had the injunction not been issued. If the petition to limit liability had been filed within a reasonable time after the second suit was commenced, the several term fees taxable under the state laws would have been avoided. These costs by the state law were a fixed charge against the petitioners, which had already accrued before the petition was filed, although taxable only upon recovery of judgment. In the case of *The Benefactor*, *supra*, I assume that the costs included in the decree of the district court were allowed as part of the damages. Section 4284 of the Revised Statutes provides that those injured "shall receive compensation in proportion to their respective losses." The losses referred to are the losses "suffered by several freighters or owners of any property whatever."

The compensation is not in terms confined to the value of the property lost; so that it cannot be said that the statute necessarily excludes any compensation for necessary charges incurred in addition to the value of the property; and the paragraph cited from the opinion in the case of *The Benefactor* shows that costs and expenses may in some cases become a subject of compensation.

The present case differs from that of *The Benefactor* only in the fact that here no judgment including costs had been obtained before the petition was filed. But the costs included in a judgment are always distinguishable from the damages; and if the costs included in a judgment already recovered may be admitted as part of the damages or loss sustained, in the subsequent proof of claims in proceedings to limit liability, it cannot be incompetent to allow similar costs, which have already accrued before the filing of the petition, where the other circumstances of the case make it equitable. The law in limited liability proceedings has been mainly built up by the decisions and rules of the supreme court, founded upon the meager outline of the statute, and upon the general doctrines of the maritime law recog-

nized and adopted by that statute. *Providence, etc., Co. v. Hill, etc., Co.*, 109 U. S. 593; S. C. 3 Sup. Ct. Rep. 379, 617. In carrying out the law as thus developed, I do not feel at liberty to disregard any clear intimations of the supreme court as respects the equitable conditions which should attend its administration in particular cases.

The circumstances of the present case have considerable analogy to that of *The Benefactor*, as respects the equity of this application. After the commencement of the second suit in the state court, the petitioners were legally in the same situation that they were in when they filed their petition nearly a year afterwards. Although there were doubtless sufficient reasons for hesitating in their application, nevertheless, having, after this considerable interval, made their application, and had the benefit of it, it is but equitable that they should pay those charges, fixed by statute, which had accrued in the pending suits in the mean time. Those charges are expenses which the plaintiffs in those suits, the claimants here, have unquestionably incurred, as incident to their loss and injury, which would have been avoided by the more prompt filing of the petition. It does not appear that the petitioners were in a situation properly to file their petition till after the commencement of the second suit. For that reason, I allow against them the amount of five term fees only, with witness fees; namely, \$55 in each case.

THE HARLEM.¹

MURRAY v. THE HARLEM.

(District Court, S. D. New York. April 1, 1885.)

CARRIERS—CARRIER OF PASSENGERS—OVERLOADING STEAMERS—PENALTY—EXCURSION PERMIT—EVIDENCE.

While the penalties imposed by law for overcrowding steam-boats must be adjudged without hesitation where the provisions designed for the security of life are violated, the court ought to be satisfied that the violation is clearly made out before finding the defendants liable. On the evidence in this case, showing but a single count, made at dusk, amid a rush of the passengers, unverified by any other evidence, and other circumstances making the excess improbable, *held*, that the libellant had not satisfactorily proved that the Harlem had more passengers than were allowed under her excursion permit, and the libel should therefore be dismissed. *Held, also*, that an excursion permit, given by the proper inspectors, for an additional number of passengers, for a period of 20 days, was not so clearly void on its face as to exclude the additional number from the lawful count.

In Admiralty.

Henry G. Atwater, for libellant.

Scudder & Carter, (Geo. A. Black,) for respondents.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. 1. The excursion permit is a sufficient protection to the steamer against liability up to the number allowed by the special permit. It was not void upon its face; it was not fraudulently obtained; it has never been set aside; and its validity is not one of the issues. I think it was intended by the inspectors, as well as by the owners, to cover just such trips as the Harlem was making. I am not prepared to hold it such an excess of authority in the inspectors, under the law, as to make it void upon its face. This serves as a protection, therefore, for the trip from Newark to Bay Ridge, as the number of passengers on that trip did not exceed that allowed by the special permit.

2. Whether, upon the return trip, the number allowed, 850, was exceeded, is a question very sharply litigated. I am entirely satisfied of the general integrity and competency of Mr. Kelly, who was employed by the libelant to count the passengers. The libelant's case rests entirely on the correctness of his count of the passengers, as they were coming off the boat at Newark, on the nineteenth of July, between 8 and 8.30 o'clock P. M. According to the almanac, the sun set at 7.37, so that the count was made about three-quarters of an hour after sunset, in the twilight. The evidence is that the passengers went off with a rush, as they would naturally do at such a time. Their tickets had been surrendered on coming aboard, and there was nothing to check the hurry and confusion usual on a late exit. The difficulty of counting with any accuracy under such circumstances is manifest; and it was practically conceded by Mr. Kelly himself in stating that he could not count the passengers accurately, even as they went on the boat at Bay Ridge, and he consequently gave it up there.

On the other hand, there is considerable force in the respondents' evidence that the legal limit was not exceeded. It is the best evidence that the respondents could possibly give in the absence of a perfectly exact count. The three boats present at Bay Ridge seem to have had sufficient capacity for all that could have been there within a half hour of the Harlem's leaving. They had perfect arrangements for shutting off passengers when the boats were properly loaded, and the practice was to give that order when the limit was reached within 50. As there were plainly present full boat accommodations for all the passengers to be carried, there was no temptation, and no reason, for putting more than the number allowed on any one boat. The superintendent was in the habit of counting those who came aboard; and he testifies that in this case he did count them, and shut them off, as usual, when within 50 of the number allowed, leaving behind some 25 or 30 in the inclosure on the pier.

While the penalties imposed by law must be adjudged without hesitation where the provisions designed for the security of life are violated, the court ought to be satisfied that the violation is clearly made

out before finding the defendants liable. Under the circumstances of this case, I do not feel sufficiently satisfied on this point to decree judgment for these heavy penalties. The difficulty of counting accurately in the twilight, on the final rush from the boat; the absence of any verification of Mr. Kelly's count by other persons who might have been procured to count the passengers, either when they came off or when they went on; the testimony of the defendants; and the circumstances of the various boats at Bay Ridge about the time of the Harlem's return voyage,—seem to me to cast so much doubt on the accuracy of Mr. Kelly's single, unverified count that I feel constrained to withhold judgment for the libelant; and therefore direct the libel to be dismissed.

THE COLUMBIA.¹

(*District Court, D. Massachusetts. April 10, 1886.*)

COLLISION—PILOT-BOAT BECALMED—STEAMER APPROACHING FROM ASTERN—FAILURE TO SEASONABLY SHOW LIGHTED TORCH—NEGLECT TO STOP AND REVERSE—HALF DAMAGES.

The pilot-boat S. was run into by the steamer C. The latter's speed, at the time of the collision, was eight knots; the former was becalmed. The line of approach of the steamer was from astern, thereby shutting out the side lights of the pilot-boat. The pilot-boat was seen "right ahead" when the steamer was three or four lengths off. The steamer's helm was ordered "hard a-port," but no change was made in her speed. *Held*, that as the evidence shows that the steamer could have been stopped in going twice her length, the order "hard a-port" was not sufficient; she should have been stopped, and her engines reversed. *Held*, that the flare-up light of the pilot-boat, if shown at all, was not shown seasonably. To exempt herself from fault, a lighted torch should have been seasonably exhibited over her stern.

C. T. Bonney, for libelant.
George Putnam, for claimant.

NELSON, J. This case was a libel for collision by the owner of the pilot-boat *Sprite*, of Boston, against the English steam-ship *Columbia*. The collision occurred in Massachusetts bay, 10 miles east of Boston light, at 15 minutes after 12 o'clock, on the morning of July 4, 1881. The *Sprite* was returning to Boston from a cruise for vessels in the bay. She had her side lights set and burning, and was lying becalmed on the port tack, her mainsail, foresail, and jib set, heading nearly due west, with one man on deck as lookout and keeper. Her master was below in the cabin, and the rest of the men were asleep. The night was fine and clear; lights could be seen at a great distance. The *Columbia* was on a voyage from Liverpool to Boston, and had taken a pilot. She was running at a speed of eight

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

knots, and was steering a course due west for Boston light. The pilot and second officer were on the bridge. A lookout was stationed forward. Her master was also on deck. As the steamer was coming up directly astern of the pilot-boat, the side lights of the latter were of course invisible to those in charge of the steamer. The port bow of the steamer struck the pilot-boat's main boom, and carried away her mainmast and main-boom, and split her mainsail and foresail.

To exempt herself from responsibility, it is necessary for the pilot-boat to prove that she seasonably exhibited a lighted torch over her stern. Her lookout states that he first saw the lights of the steamer three or four miles off, and showed a flare-up light. He then went below and called the master. The master came on deck, looked at the steamer, and went below again. The lookout called him a second time. Both agree that no flare-up was shown after the first one, until the master came on deck the second time. I am not convinced that the lookout's statement as to the first flare-up is true. It was not seen on the steamer. The sailing master of a yacht in the vicinity, who was watching the pilot-boat and steamer, saw the second flash, but did not see the first one. This man was called as a witness by the pilot-boat. There was also evidence that the master of the pilot-boat complained of the conduct of the lookout. Nor do I think it is sufficiently proved that a second flare-up was shown until the pilot-boat was so close under the bows of the steamer that the light could not be seen from the deck and bridge of the latter. The statements of the master and lookout, and the other evidence in the case, are not sufficient, in my judgment, to overcome the strong presumption that, in the clear atmosphere, a flare-up light on the pilot-boat would not have escaped the observation of the pilot, second officer, and lookout on the steamer, who were all looking ahead for lights. It is certain they saw no flash-light before the collision. A man on the steamer, not in the watch on deck, called by the libellant, says he saw a flash-light on the pilot-boat when a ship's length off. He was not in as good a position to see ahead as those engaged in the management of the ship, and I doubt his story.

As to what occurred on board of the steamer, the evidence, taken in its most favorable light for her, shows this: The lookout reported "a vessel right ahead." The second officer, who was in charge, says that on the report of the lookout he looked and saw nothing. He then took his glasses, and looked, and saw a dark object ahead, and he then gave the order hard aport. The lookout states that the pilot-boat, when first reported, was three or four lengths off. It also appears from his testimony, as well as from that of the pilot, that the ship was stopped, after the collision, in going twice her length. The report of the lookout of "a vessel right ahead" was a clear indication that a collision was imminent. The order "hard aport" was therefore not sufficient under the circumstances. The order should have been to stop and reverse. Upon the steamer's own evidence, this

would have prevented the accident. This was required by the sailing rules of both nations, and was the plain duty of the steamer.

Having held the pilot-boat at fault upon another ground, I have not found it necessary to consider the defense made by the steamer that the pilot-boat was sailing with side lights, and not under a mast-head pilot light.

Both vessels being at fault, a decree is to be entered for the libellant for one-half the damages. Ordered accordingly.

MASON v. ERVINE and others.¹

(Circuit Court, E. D. Louisiana. December 10, 1885.)

1. ADMIRALTY—PRACTICE—APPEAL—BOND—PARTIES.

Where the motion and order for appeal were not taken against any of the numerous libellants by name, and where no bond was given in favor of any other than one of the libellants, the appeal can only hold as to him, and must be dismissed as to the others.

2. SAME—AMENDMENT OF PROCESS.

On appeal from district to circuit court, defective process cannot be cured by amendment.

3. SAME—DISMISSAL.

The City of Lincoln, 19 Fed. Rep. 430, followed.

On Motion to Dismiss Appeal.

O. B. Sansum, for libellant and appellant.

J. R. Beckwith, for defendants and appellees.

PARDEE, J. This case seems to be similar in all respects to the case of *Kelly v. The City of Lincoln*, decided by this court at the last term, and reported in 19 Fed. Rep. 460. In the *Kelly Case* an appeal was well taken against Kelly, but not against the other libellants. Here an appeal is well taken against John Ervine, but not against any of the other respondents. In the *Kelly Case* the appeal was dismissed as to all, Kelly included, because as against Kelly the amount in controversy was less than \$50. In the instant case it does not as yet appear whether the case is one that is appealable against Ervine alone. If it is, the appeal can stand as to him; if not, it can hereafter be dismissed. There is no authority for the court to allow by amendment new parties to be brought into the case on appeal. None of the parties respondent in the district court, except Ervine, are parties to the appeal, and no bond taken at this late day ought to be permitted to bring them in.

The motion to dismiss must be granted for all the respondents, except Ervine, and it is so ordered.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

YOUNG v. ARONSON.

*(District Court, S. D. New York. April 17, 1886.)***COURTS—FEDERAL AND STATE COURTS—EXECUTION—SUPPLEMENTARY PROCEEDINGS—RECEIVERS.**

Upon an examination of a judgment debtor in proceedings supplementary to execution, in accordance with the state practice in common-law actions, as a substitute for the old creditors' bill, a federal court is not bound to appoint the same person as receiver that was previously appointed in a similar prior proceeding in the state courts. As these independent jurisdictions have no common superior, confusion and conflict will be most likely avoided by the appointment of independent receivers. Especially should a different receiver be appointed where circumstances afford reasonable suspicion that the prior receiver was obtained by collusion with the judgment debtor.

At Law.

Nelson Smith, for plaintiff.

G. W. Carr, for defendant.

BROWN J. Upon an examination in proceedings supplementary to execution upon a judgment of this court, in a common-law action, in accordance with the practice of the state courts under the state Code of Procedure, which has been in part adopted by this court, the plaintiff is entitled to the appointment of a receiver; and it is urged that the court should appoint the same receiver already appointed by the state court upon a small judgment of about \$100 prior to the proceedings in this action. Where similar supplementary proceedings are had upon judgments in different courts of the state, it is provided by section 2466 of the New York Code of Procedure that no other receiver shall be appointed, but that an order may be made in any subsequent cause extending the receivership to the proceeding in that cause. Section 2471 declares that such a receiver "is subject to the direction and control of the court out of which the execution was issued;" and, upon any subsequent orders extending the receivership to other judgments, "the control over, and direction of, the receiver with respect to that judgment remain in the court to whose control and direction he was originally subject."

The latter provision indicates a manifest objection to the appointment by a federal court of the same receiver that has been appointed in the state court. By accepting a subsequent appointment from a federal court, the receiver would become amenable to the federal jurisdiction. But no mere order appointing him, without his acceptance, could make him so. If he accepted the federal appointment, he would become subject to the direction of two independent tribunals, upon the application of different creditors, without concert of action, and with no common superior. Such a receiver would be liable to become subject to conflicting orders, and to conflicting duties, unless the federal court, or the state court, were to renounce any authority, direction, or control over him, or over the fund of which the receiver

might become possessed; which is manifestly inadmissible. The state statute intrusts all control over the receiver in the case of several appointments in different state courts to the court by whom the receiver was originally appointed, and thereby any confusion or conflict of jurisdiction is avoided among the several state tribunals. But that statute cannot control the appointments of the federal courts.

A receiver is an officer of the court that appoints him. He, and the fund that he represents, must be under the control of the court that appoints him, except in so far as some statute otherwise provides. He has no authority beyond the jurisdiction that appoints him: *Booth v. Clark*, 17 How. 322. A federal court could not retain its proper independence and control over the receiver appointed by it in its own cause if it were to appoint a state officer subject by state statutes to the exclusive control of a state tribunal. There is no state or federal statute authorizing a state court to direct the receiver, or to control the fund, in the interest or for the benefit of a creditor under a federal judgment. His relief and protection devolve on the federal court in which the judgment was obtained.

It is asserted that the receiver appointed on the small prior judgment in the state court has never done anything in regard to the debtor's estate, and that there is ground to believe that the proceeding and appointment were collusive, and as a further protection against the debtor's alleged frauds. In the state courts the proper remedy in such a case would, perhaps, be for a subsequent creditor upon a state judgment to apply for the removal of such a receiver to the court that appointed him; but a federal creditor would have no legal *status* in a state court upon such an application, because there is no statute which requires the state court to interfere for his benefit.

I do not perceive any special difficulty or embarrassments likely to arise in this case from the appointment of separate receivers. Prior to rule 139 of the late court of chancery, different receivers were often appointed. *Cagger v. Howard*, 1 Barb. Ch. 368. A receiver in supplementary proceedings represents only the rights of the creditor on whose judgment he was appointed. Even as respects undoubted assets in the debtor's possession, his authority and power to collect extend no further than to make the amount of the judgment, with interest, costs, and expenses; while as respects property held by third persons in alleged fraud of judgment creditors, such a receiver acquires no lien even, until he has filed a bill, or taken other legal proceedings to avoid the fraudulent transfer, or to assert his right of possession, (*Olney v. Tanner*, 10 Fed. Rep. 107-114;) and, if successful, he recovers only the amount of the judgment in which he was appointed, with costs and expenses, (*Bostwick v. Menck*, 40 N. Y. 383.) *Swift v. Johnson*, 26 Fed. Rep. 828. If the prior state receiver were therefore actively prosecuting his duties, a different receiver appointed by this court, while bound to respect any legal title or lien acquired by the prior receiver in any specific property, or any steps already

taken by him to acquire any particular assets, (High, Rec. cc. 2, 3,) would not be precluded from taking any appropriate legal measures to avoid fraudulent transfers which the prior receiver had not attacked, nor from taking the debtor's admitted assets after the prior judgment and expenses were satisfied. That is the object of the present application. To appoint the prior state receiver would apparently tend to defeat the whole object of this proceeding. While I do not say that there may not be special circumstances which might justify the appointment of a state receiver who was willing to act under both jurisdictions, this is not such a case, and I greatly doubt whether the same appointment should ordinarily be made, except on consent of the parties. Confusion and conflict between independent jurisdictions will usually be best avoided by the appointment of independent receivers of this kind. No reference is here had to suits relating to specific property, which is the subject of the action, nor to cases in which certain property is within the exclusive or peculiar jurisdiction of another tribunal.

The plaintiff in the present case is assignee in bankruptcy, and I see no objection to his being made the receiver in this case. An order may be drawn for his appointment.

St. Louis & S. F. Ry. Co. v. JOHNSTON, Receiver, etc.

(Circuit Court, S. D. New York. April 21, 1886.)

1. BANKS AND BANKING—COLLECTION OF DRAFT BY INSOLVENT BANK—DRAWER, WHEN ENTITLED TO PROCEEDS.

A., who for several years had kept an account with the Marine National Bank of New York, on May 5, 1884, deposited a sight draft, dated that day, and drawn by him on a corporation of Boston, Massachusetts, which was indebted to him in the amount of the draft. The bank was insolvent at the time, but the draft was forwarded to its collection agent at Boston, and paid May 7th, after the bank had failed and closed its doors. On several previous occasions A. had deposited similar drafts, and been credited therewith as cash, and they were treated by him as cash deposits. On the occasion in question the bank credited plaintiff with the draft as a cash item. *Held*, that the draft was not the property of A. when paid by the drawee, and that he was not entitled to recover the amount thereof from the receiver.

2. SAME—CREDIT OF SIGHT BILL AS CASH—DISCOUNT.

When a sight bill is credited by a bank to a customer as a cash item, with the latter's assent, the transaction is equivalent to a discount of the bill by the bank.

In Equity.

Burrill, Zabriskie & Burrill, for complainant.

Develin & Miller, for defendant.

WALLACE, J. The proofs show that for several years prior to the fifth day of May, 1884, the plaintiff kept an account with the Marine National Bank of the City of New York, making deposits with

and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft for \$17,835, dated that day, and drawn by the plaintiff upon the treasurer of the Atchison, Topeka & Santa Fe Railroad Company, of Boston, Massachusetts, which company was indebted to the plaintiff in the amount of the draft. The bank was insolvent at the time, but forwarded the draft to its collecting agent at Boston, and the amount was paid to such agent by the drawee on the seventh day of May, after the bank had failed and closed its doors. On several occasions during the time the plaintiff kept an account with the bank the plaintiff deposited similar paper at the same time with money, and the bank credited the plaintiff upon its books, and also upon the pass-book of the plaintiff, with the amount of such paper as a cash item. The plaintiff also entered the amount of such drafts in a memorandum of deposits kept in its check-book among cash items. The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash. When the draft in suit was deposited it was sent to the bank by a messenger boy, but the plaintiff's pass-book was not sent, having previously been left with the bank for the purpose of being written up. The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item, but it was not entered in the pass-book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge. The defendant, who is the receiver of the bank, had notice of the plaintiff's rights before the proceeds of the draft were paid over to him by the collecting agent at Boston.

Inasmuch as the proceeds of the draft had not become commingled with the other moneys of the bank when the defendant took possession of its assets, but were capable of identification, the plaintiff is entitled, if they are its property, to follow them into the hands of the receiver, and regain them. *Illinois Trust & Sav. Bank v. Smith*, 21 Blatchf. 275; S. C. 15 Fed. Rep. 858. The question, therefore, is whether the draft belonged to the plaintiff at the time it was paid by the drawee. If it did, the defendant did not acquire title to the money. If the transaction in controversy was equivalent to a discount of the draft, the bank acquired title to the paper; if it was not, the bank merely became the agent of the plaintiff to collect the proceeds.

The case of *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 531, (affirming the same case in the supreme court, reported in 25 Hun, 101,) is an authority directly in point against the plaintiff's right to recover. In that case the plaintiff deposited with the bank a check drawn upon another bank in a different city, indorsed by him, and the amount of the check was entered by the bank upon the pass-book of the depositor as cash, with the depositor's knowledge. It was held that

the bank became the owner of the check. The opinions delivered in this case, both in the court of appeals and in the supreme court, are a full and able discussion of the questions involved, and contain a full review of the authorities bearing upon them. On the other hand, the case of *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675, decided by the circuit court of the district of New Jersey, follows the views expressed in *Morse on Banks and Banking*, (page 427,) and holds that the checks so deposited do not become the property of the bank, although by the course of business between the depositor and the bank the depositor has been allowed to draw against the deposits before the paper has been actually collected.

Upon principle, there is no reason why, if the parties choose to treat the deposit of such paper as a deposit of cash, the transaction should not be deemed equivalent to a discount of the paper by the bank. Sight bills, drawn by one corporation upon another of prominent financial standing, like the interest coupons of such corporations, or like certified checks upon banks, are generally accepted in commercial usage as the equivalents of money. They have practically the same attributes as bills issued by banking corporations, which are merely promises to pay at sight, and are everywhere accepted as money, in the absence of special circumstances affecting the financial standing of the corporation issuing them. Where bank-bills are credited at their face to their depositor, and are treated by the depositor as a deposit of money, the bank receiving them becomes a debtor to the depositor for the face amount, although the currency may at the time be depreciated. *Marine Bank v. Fulton Bank*, 2 Wall. 252.

When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money, and, as such, as a creditor of the bank instead of a bailor of the paper. Under such circumstances it should be held that the bank acquires title to the paper just as it would to a deposit of money. The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances.

It is quite certain that bankers do not invariably credit their customers for sight paper as for cash, but are generally influenced by the financial responsibility of the customer, or the drawee of the paper,

or both. If a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper. This was done in *Thompson v. Giles*, 2 Barn. & C. 422, in the *Case of Rowton*, 1 Rose, 15, and in the *Case of Sargeant*, Id. 153. Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural implication would seem to be that the bank, by making such an entry, assumes to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper. For these reasons the conclusions reached in *Metropolitan Nat. Bank v. Loyd* are adopted as satisfactory. The authorities bearing upon the general questions are so fully cited and discussed in the opinions in that case that it is deemed unnecessary for present purposes to refer to them.

Although the plaintiff had never drawn against the credit for bills given by the bank, it appears that its balance was so large that there was never any necessity for it to do so. There is no room to doubt that its checks would have been honored if they had been drawn. The case is therefore to be considered as one where the course of business between the parties implied the understanding of both that sight bills should be treated in their account as cash.

It is insisted for the plaintiff that the bank did not acquire title to the draft because it was insolvent, and this fact was known to its officers when the draft was delivered to it by the plaintiff. The case cannot be considered upon this theory, because there is no allegation in the bill that the officers of the bank entertained any fraudulent intention towards the plaintiff in receiving the paper, and the bill does not proceed upon such a theory. If the officers of the bank supposed the institution would be able to maintain its credit, and thus surmount its difficulties, they were under no legal duty to the plaintiff to disclose the state of its affairs. Silence with regard to a material fact, which there is no legal duty to divulge, will not vitiate a contract, although it eventually operates to the injury of the party from whom the fact is concealed. It is well settled that fraud cannot be imputed to a party who contracts an obligation knowing himself to be insolvent, merely because he omits to disclose the fact to the other contracting party. *Redington v. Roberts*, 25 Vt. 686; *Patton v. Campbell*, 70 Ill. 72; *Smith v. Smith*, 21 Pa. St. 367; *Nichols v. Pinner*, 18 N. Y. 295; *Attwood v. Small*, 6 Clark & F. 232.

If the bill were properly framed to present the question of fraud, the facts disclosed in the proofs might justify the conclusion that the affairs of the bank were so hopeless, and presumably known to be so to its officers, as to preclude the existence of an honest expectation on their part to repay the plaintiff's deposit; but the rule is inflexible that the decree must be *secundum allegata*.

A decree is directed dismissing the bill.

ARMENGAUD v. COUDERT and others.

(Circuit Court, S. D. New York. April 15, 1886.)

EQUITY—PLEADING—PLEA—STRIKING OUT—SETTING DOWN FOR ARGUMENT.

A plea which alleges matters properly to be brought forward by an answer only is not a pleading recognized by the rules of practice, and will be stricken from the files; but if the matters alleged are the proper subject of defense by way of plea, then such pleading, although not good in substance, is an authorized pleading, and all objections to it must be taken by setting it down for argument.

In Equity.

W. H. L. Lee, for complainant.

Edward K. Jones, for defendants.

WALLACE, J. The plaintiff has moved to strike the defendants' plea from the files, and alternatively to strike out certain parts of the plea. The question which is really presented by such a motion is not whether the plea is good in matter or substance, but whether such a pleading can be interposed to the bill. A plea which alleges matters properly to be brought forward by an answer only is not a pleading recognized by the rules of practice, and will be stricken from the files; but if the matters alleged are the proper subject of defense by way of a plea, then such a pleading, although not good in substance, is an authorized pleading, and all objections to it must be taken by setting it down for argument.

The bill avers the existence of a cause of action which entitles the plaintiff to an accounting, and also avers, by way of anticipating a defense, that the defendants rely upon a release of the cause of action, the existence of which the plaintiff does not admit, but which, if it does exist, was procured by fraud and misrepresentation, the particulars of which are set forth in detail. The defense of a release of the cause of action which a plaintiff sets forth in his bill may always be brought forward by plea. Ordinarily, such a defense constitutes a pure plea, because it rests upon matters *dehors* the bill. The plea in this case is not of that character, because, to be good, it must negative some of the averments of the bill. The pleader has not negatived the averments setting forth that the release was procured by fraud, but confines his plea to the other allegations of the bill, and answers to the averments of fraud by denying the fraud. It is, of course, competent for a defendant to plead to part of a bill, and answer to the residue; and if his plea is maintained, it is a bar to the relief *pro tanto* to which the plaintiff would otherwise be entitled; but he can gain nothing by a plea to part of the bill, if his plea fails to meet other allegations which, if true, would, notwithstanding the matters alleged in the plea, entitle the plaintiff to all the relief sought.

It is stated in Story, Eq. Pl. § 680, to be "now firmly established that the plea itself, as well as the answer, must contain the aver-

ments negating the facts and circumstances so set up in the bill in avoidance of the bar or defense." Tested by this rule, the present plea would seem to be bad. Assuming this to be so, however, the plaintiff's remedy is not by motion to strike it from the files, but by setting it down for argument.

The motion is denied.

FREUND v. YAEGERMAN.¹

(Circuit Court, E. D. Missouri. March 25, 1886.)

1. ASSIGNMENTS—SECTION 354, REV. ST. MO.—MORTGAGING ENTIRE ASSETS.
Petition for rehearing denied.

2. COURTS—CONSTRUCTION OF.

The only Missouri court which is an authoritative expounder of the state statutes is the supreme court.

In Equity. Petition by the defendant for a rehearing.

For a report of the previous opinion in this case, see 26 Fed. Rep. 812.

A. Binswanger and E. Smith, for complainant.

Robert Goode, for defendant.

BREWER, J., (orally.) In *Freund* against *Yaegerman* there is a petition for a rehearing. The case comes clearly within the line of the cases heretofore decided in this court, commencing with *Martin v. Hausman*, 14 Fed. Rep. 160, and ending with *Clapp v. Nordmeyer*, 25 Fed. Rep. 71. In the course of the various opinions that I have had occasion to express, I have stated fully my own views, and the reasons why, in deference to the opinions of the other judges in this district, including the presiding justice, I have made those decisions. In the last, or next to the last, of those cases I stated that that would be the rule of this court until there had been an authoritative declaration by the supreme court of the United States or the supreme court of the state of Missouri to the contrary. Now there is presented a decision of the Kansas City court of appeals which it is claimed enunciates views different from those announced heretofore, and in harmony with the opinions that I personally hold, and I am asked to reverse the line of decisions here. That is not an authoritative exposition of the law in Missouri. The St. Louis court of appeals may rule one way and the Kansas City court of appeals another. There is but the one authoritative expounder of the Missouri statutes in this state, and that is your supreme court. So the petition for the rehearing will be denied.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

INGLES and others v. NEW ENGLAND MUT. LIFE INS. Co. and others.

(Circuit Court, D. Massachusetts. April 9, 1886.)

FRAUD ON CREDITORS—LIFE INSURANCE—PUB. ST. MASS. CH. 119, § 167.

Where a contract of insurance is made in furtherance of a conspiracy between the insured and his wife to defraud and cheat the creditors of the former, the most the creditors can reach, under the Massachusetts statute, (Pub. St. c. 119, § 167,) is an amount equal to the premiums paid with intent to defraud creditors, with interest thereon.

In Equity.

C. J. Babbitt and Stearns & Butler, for plaintiffs.

A. D. Foster, for insurance company.

H. L. Harding and Henry Jackson, for Susan D. Harwood.

COLT, J. The plaintiffs in this suit, as creditors of Norman B. Harwood, seek to reach and apply the proceeds of a policy of insurance issued by the defendant company in favor of Harwood, for the benefit of his wife and children, who are also made parties defendant. The bill alleges that the contract of insurance was made in furtherance of a conspiracy between Harwood and his wife to defraud and cheat the creditors of the former, and that the premiums paid upon the policy were paid out of moneys fraudulently obtained from his creditors. The present motion raises the question whether, under these circumstances, the court should continue the injunction restraining the insurance company from the payment of the policy to the widow. The policy contains a provision that the contract shall be governed and construed by the laws of Massachusetts. Section 167 of chapter 119 of the Public Statutes of Massachusetts provides as follows:

"A policy of insurance on the life of a person, expressed to be for the benefit of a married woman, * * * whether procured by herself, her husband, or any other person, * * * shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting * * * the same, or his creditors. * * * When a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of such other or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same. If the premium is paid by a person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors, subject, however, to the statute of limitations."

The statute seems to provide specifically for the case before us. Admitting the allegations of the bill to be true, it appears that, upon the policy in suit, the premiums were paid by a person or persons with intent to defraud creditors. Under the statute, therefore, it seems clear that the most the creditors can recover is an amount

equal to the premiums so paid, with interest thereon. The injunction may be vacated, except as to a sum equal to an amount of the premiums paid, and interest thereon.

CLEVELAND ROLLING-MILL CO. v. TEXAS & ST. L. RY. CO. and others.¹

(Circuit Court, E. D. Missouri. March 24, 1886.)

1. CORPORATION—STOCKHOLDERS—SUIT TO ENFORCE LIABILITY—PARTIES.

A bill in equity to charge holders of nominally paid-up stock cannot be maintained on behalf of a single judgment creditor, but must be on behalf of all entitled to share in such assets.

2. SAME—CORPORATION IN HANDS OF RECEIVER.

Semble, that where the corporation is in the hands of a receiver he is not the only party who can sue.

3. SAME—LIABILITY OF HOLDERS OF NOMINALLY PAID-UP STOCK—NOTICE.

Holders of nominally paid-up stock, upon which nothing has been paid, are not liable for the amount due thereon, unless they took with notice.

In Equity. Bill to charge holders of nominally paid-up stock on behalf of a single judgment creditor. Demurrer to bill.

The bill charges, in substance, that all of the defendants except the Texas & St. Louis Railway Company are subscribers to and owners of unpaid-for stock issued to them as purchasers of the company's bonds, as a bonus, and that said stock was issued by said company through one Hubbard, who had ostensibly taken the contract to construct said company's road in consideration of all its stock and bonds, though said road was, in fact, constructed by the company itself.

Ira C. Terry and Fisher & Rowell, for complainant.

Dyer, Lee & Ellis, Hough, Overall & Judson, Phillips & Stewart, John G. Chandler, Farrish & Jones, and John P. Davis, for defendants.

BREWER, J., (orally.) In the case of *Cleveland Rolling-mill Company v. Texas & St. Louis Railway Company* there is a demurrer to the bill. The bill is one to charge stockholders in the railroad company for and on behalf of a judgment creditor. Three grounds are alleged:

First. That the bill is brought simply on behalf of a single complainant, instead of on behalf of all the creditors. That is a defect: a bill in equity must be in behalf of all entitled to share in such assets. Therefore that calls for a sustaining of the demurrer.

Second. That the receiver is the party to bring suit. On the face of these papers, except by implication and reference to other proceedings, it does not appear that there was ever a receiver, and, if there

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

was, we do not think he is the only party who can bring suit for the collection of these unpaid subscriptions of stockholders.

The *third* objection is that it does not appear that these stockholders were original subscribers to the stock of the company, and had not paid for their stock. The bill, I think, is open to criticism in that respect. I do not mean to say that the language does not carry the idea which counsel evidently had in mind, and yet I think it is perhaps not sufficiently perspicuous, and as the demurrer will have to be sustained, and leave given to amend the bill, the language should be made clear and fuller, to show that these parties took the stock directly from the company, and not from a contractor, or that they took it with knowledge of the fact that this party, who is alleged to have been a sham contractor, was such, and that it was simply a device to evade the rule of liability for non-payment of stock. Of course, it is very patent what the idea of the counsel was in the matter; and, giving particular force to the words used, it may be that it is sufficient; but, as long as the bill must be amended in the other respect, it would be better to make it full, clear, and specific, so that there shall be no question as to what the facts are that are charged.

The demurrer will be sustained, and leave given to file an amended bill by the next rule-day.

RIKER v. ALSOP and others.

(Circuit Court, S. D. New York. April 15, 1886.)

RAILROADS—BONDS—FORECLOSURE OF MORTGAGE—OHIO AND MISSISSIPPI RAILWAY COMPANY.

Contract whereby complainant surrendered certain bonds held by him, and accepted in lieu thereof mortgage bonds, known as "Construction Bonds," of the Ohio and Mississippi Railway Company, (eastern division,) construed, and held, that he was entitled to priority over the claims of the Ohio and Mississippi Railway Company, as reorganized under the title acquired by a foreclosure of a prior mortgage.

In Equity.

B. W. Huntington, for complainant.

Platt & Bowers, and *Geo. W. Wingate*, for defendants.

WALLACE, J. The complainant files this bill to compel the defendants to account as trustees for the value of certain mortgage bonds known as "Construction Bonds," issued by the Ohio & Mississippi Railway Company, (eastern division,) of which he was holder when the defendants transferred to the Ohio & Mississippi Railway Company (as reorganized) the property and franchises of the original company, which they had purchased upon a sale under a foreclosure of a prior mortgage of that company. The theory of the bill is that

when the defendants purchased the property and franchises of the company upon the mortgage foreclosure they were trustees for the complainant, and for other holders of outstanding construction mortgage bonds, and it was their duty to preserve and recognize the lien of the holders of such bonds as paramount to the title acquired upon the purchase; but that in violation of this duty they conveyed the property purchased discharged of the lien of the bonds to the Ohio & Mississippi Railway Company, (as reorganized,) and thereby extinguished the prior lien.

It appears by the proofs that in December, 1858, the complainant was the owner of nine bonds, for \$1,000 each, part of an issue of \$4,242,000, known as "Construction Bonds," created by the railway company and secured by a mortgage upon its property and franchises. The company had created two prior issues of mortgage bonds secured, respectively, by first and second mortgages upon its property, the construction bonds being secured by a third mortgage. The company was financially embarrassed. It was in default three interest payments on its first mortgage bonds, as well as in the payment of interest upon its second mortgage bonds, its construction bonds, and its income bonds, which were secured by a fourth mortgage. The defendant Alsop, and six others who were interested as creditors of the railway company or otherwise, issued a circular to the stockholders and creditors of the company, suggesting a plan to reduce its indebtedness and place it upon a more secure financial footing. By this plan the second mortgage bonds of the company which, with principal and unpaid interest, amounted to something over \$300,000, were to be retired; the amount of construction bonds, the principal of which was \$4,242,000, was to be reduced one-third; the income bonds, comprising an issue of \$3,200,000 were to be exchanged for capital stock; and an adjustment was to be made of all other indebtedness, so that the total mortgage debt of the company should be but \$5,000,000, and the capital stock of the company should be limited to \$7,500,000; making the aggregate liabilities of the company \$12,500,000, as against \$18,393,000 then existing. By that circular the stockholders and creditors of the company were invited to join in an agreement annexed, dated as of the fifteenth day of December, 1858, in which Alsop and the others offered to act as trustees for all parties who might subscribe, to effect an adjustment between the bondholders, stockholders, creditors, and the railway company, according to the general plan proposed by the circular. This agreement, in substance, provided that the railway company should issue and deliver to the trustees \$7,500,000 of capital stock, to be exchanged by them for the outstanding shares, to enable them to retire the whole issue of second mortgage bonds, one-third of the issue of the construction bonds, and the whole issue of income bonds; that the stockholders of the company should surrender their stock to the trustees, and receive in exchange new stock for one-tenth of the

amount thereof, at par; that the holders of construction bonds should deliver one-third of their bonds to the trustees, and receive in lieu thereof shares of the capital stock of the company at par; that the holders of second mortgage bonds should deliver all their bonds to the trustees, and receive in lieu thereof construction bonds at par for two-thirds and capital stock at par for one-third the amount; and that the holders of income bonds should deliver all their bonds, and receive in lieu capital stock at par.

As it was essential to the success of the plan that substantially all the holders of bonds, debts, and stock should unite, the first 12 articles of the agreement were framed upon the theory that all parties in interest should subscribe. Accordingly, it provided that the trustees should hold all the bonds, stock, and debts which might be surrendered to them as a trust fund for the benefit of all the persons contributing to the fund by the surrender of bonds or stock, and should issue to each subscriber to the agreement making such delivery to them a certificate or certificates, which should be evidence of his interest in the fund according to the relative value of the assets delivered by him to the whole amount of the fund. It also provided that the trustees should exchange the bonds, debts, and stock constituting this trust fund with the railway company for new capital stock of the company, and, when this exchange was effected, should apportion the new stock among the certificate holders according to their respective interests; and that the company should retire the bonds and stock which had been delivered to the trustees and by them to it. By the eleventh article of the agreement it was provided that the certificate holders should hold annual meetings or special meetings at the call of the trustees, at which it should be competent for two-thirds of the holders to modify the agreement or any part thereof.

The agreement was also framed to meet the contingency that the consent of all of the creditors or stockholders could not be obtained, or that foreclosure proceedings might be instituted, and contained provisions to protect the interests of all concerned provided the plan contemplated by the first 12 articles of the agreement could not be successfully carried out. These provisions authorized the trustees to borrow money if it should become necessary to do so in order to protect the interests of the parties; declared that moneys raised by the trustees should become a part of the trust fund in their hands; and authorized the trustees to issue certificates for the sums raised which should give the holders an interest in the fund proportioned to the amount their certificates should bear to the whole amount. By the fourteenth and fifteenth articles of the agreement the trustees were empowered, when in their opinion the exigency of a sale of the road and property should be imminent, to make such arrangements with the mortgagor or the owners of the bonds secured by the mortgage as would enable them to protect the interests of the trust, or purchase the road and property; and were directed, in the event of a purchase, to transfer

the road, and any other property belonging to their trust, to the certificate holders, each to be entitled to the proportion borne by his certificate to the whole amount of certificates; and it was further provided that upon such transfer the trust was to be deemed discharged and terminated. The sixteenth article of the agreement provided for the protection of the rights of the parties in the event of a purchase of the property by any subscriber or subscribers to the agreement by permitting every other subscriber to tender to the purchaser such a proportion of the purchase money as would be equal to the relative amount of his certificate to the whole amount of certificates, and, upon making such tender, to participate in the purchase in the ratio that the money paid by him should bear to the whole purchase money. The agreement also contained a provision which permitted any subscriber to contribute his remaining bonds to the trust, and receive in exchange a certificate which should be "equal to the amount of the bonds and the interest due thereon."

The complainant, and many creditors and stockholders of the railway company, subscribed the agreement. The complainant produced his nine bonds to the trustees, surrendered three of them, obtained his certificate, and retained the remaining six. Prior to December 13, 1860, the great body of stockholders had surrendered their stock to the trustees, and a large amount of the second mortgage bonds and construction bonds had been surrendered; but a foreclosure of the second mortgage had been commenced in the interest of certain bondholders secured by that mortgage who had not surrendered their bonds. The foreclosure suit proceeded to a decree, and a sale of the property covered by the mortgage bonds was advertised. The trustees procured the parties in interest in the foreclosure suit to sell to them the greater part of their bonds, and, under this arrangement, all the second mortgage bonds, except some \$15,000 in amount, came into the hands of the trustees, and the foreclosure proceedings were suspended; but in 1866 the trustees procured the complainants to readvertise the property for sale under the decree in that suit, and on the ninth day of January, 1867, the entire property and franchises of the corporation were sold under that decree for the sum of \$1,000,000, the trustees becoming the purchasers. Thereupon the formal title to the property and franchises of the corporation was transferred to the trustees. This was done pursuant to a plan for the reorganization of the company, by which a new corporation was to be created, and the property of the old corporation purchased by the trustees under foreclosure was to be conveyed to it. At this time the affairs of the corporation were prosperous. The trustees controlled all its debts except \$2,113,000 of the first mortgage bonds, \$15,000,000 of the second mortgage bonds, and \$37,402 of construction bonds.

Prior to the commencement of the suit to foreclose the second mortgage, meetings of the certificate holders had been held, which

had been duly called pursuant to the eleventh article of the trust agreement, at which various modifications of the agreement were adopted by the certificate holders. Prior to the purchase by the trustees the holders of construction bonds had surrendered nearly all of their bonds under the provision in the agreement permitting them to do so, so that but a few of these bonds were left outstanding. The complainant did not surrender six of the nine bonds which he originally held. The proposed reorganization of the company, and the purchase by the trustees under the foreclosure of the second mortgage, were sanctioned by the requisite majority of certificate holders, at meetings duly called. The complainant did not personally participate. He had previously sold his certificate, and the holder participated in the acts of the other certificate holders. At the time of the purchase the trustees seemed to have assumed that they owed the complainant no duty respecting the six bonds which he had not surrendered. After the purchase they conveyed the property and franchises of the company to the new corporation, and that corporation and the trustees have ever since refused to recognize the rights of the complainant, but insist that all his equities as a holder of construction bonds were cut off by the sale under the foreclosure of the prior mortgage.

Upon these facts, it must be held that the complainant is entitled to the relief sought by the bill. Nothing contained in the agreement, or growing out of the relations between the trustees and the holders of construction bonds, authorized the trustees to disregard the rights of holders of the bonds who subscribed the agreement to have their bonds to the extent of the two-thirds not surrendered treated as a subsisting lien upon the property of the corporation in any contingency which might arise under the trust. The provisions of the trust agreement are to be interpreted in the light of the situation existing when it was offered for signature, and of the objects in view as announced by the circular to creditors and stockholders to which it was appended, and with which it is to be read. The trustees did not propose to change the *status* then occupied by the creditors and stockholders, except so far as would be effected by retiring the second mortgage bonds, reducing the construction bonds from \$4,242,000 to \$2,828,000, and extinguishing the junior income mortgage bonds, and the unsecured debts at the expense of the stockholders of the company who were to surrender their shares.

As appears by the statements in the circular, and from the whole scheme of the agreement, the trustees proposed the attempt of readjusting the indebtedness of the company upon the basis of concessions, whereby both creditors and stockholders were to deliver their claims or shares to the trustees for an exchange with the company for such moneys as the company might have applicable to the payment of its debts, and for new capital stock to an amount not exceeding \$7,500,000, unless a further reduction of the bonded debt of

the company might authorize it to increase its capital stock. This was the primary object contemplated by the trust agreement, and all the provisions of the agreement concerning the creation of the trust fund, the disposition to be made of it, and the power and duties of the trustees in the premises, are to be treated as subservient to the main plan and purpose which was proposed to be accomplished. The concessions to be made by holders of construction bonds was the surrender by them of one-third of the principal of their bonds, and the acceptance in lieu thereof of an interest in the trust fund which was to come into the hands of the trustees under the plan of the agreement. Beyond the one-third which they were to surrender, they were to have no interest in the trust fund, and their rights were to remain the same as though no agreement had been subscribed; and the only change effected in their previous relations to the company was that thenceforth they were embarked with the trustees in the common undertaking which the trustees obligated themselves to carry out. By the terms of the agreement the trustees promised to distribute the trust fund which was to be created among the certificate holders according to their respective interests. If they had succeeded in exchanging the claims which had been surrendered to them by creditors for stock of the company, the trust fund which they would have distributed would have been the stock of the company, and the certificate holders would have become stockholders whose rights would have been subordinate to the existing mortgages upon the property. The holders of construction bonds who had surrendered a third of their holdings under the agreement would have occupied the position of stockholders for the amount surrendered, but their rights as bondholders for the unsurrendered two-thirds of their bonds would have remained the same as before.

It was not contemplated by the agreement that the trustees should acquire title to the road and franchises of the company, unless it should become necessary to do so in order to avert a sale under a foreclosure for the protection of their *cestuis que trust*. Had this contingency occurred, they would still have maintained the position of trustees towards all those who subscribed the agreement, and their purchase would have been made in the interests of all, and with a view to carry out the general objects which they originally proposed. If that had happened, the road and franchises, as well as the fund already existing in their hands, would have become merged in the general trust fund, which they were to distribute conformably to the scheme of the trust. There is not a word in the agreement to indicate that they could purchase the road discharged of the equitable lien of those who had surrendered a portion of their bonds in order that the remaining part should be more safely secured. The trustees would have bought the road and franchises not discharged of the lien of two-thirds of the construction bonds, which it was one of the purposes of the trust to protect, but in subordination to it; and it would

then have been their duty, when making distribution to the certificate holders under the fifteenth article of the trust, to recognize and protect the rights of construction bondholders who had subscribed the agreement. If they had purchased the road when a foreclosure sale was imminent, the trust fund which would have been in their hands for distribution would have been in equity precisely what it would have been if no foreclosure sale had taken place and no purchase had been made; and the rights of holders of construction bonds who had subscribed the agreement to have their security as to two-thirds remain undisturbed, and the duties of the trustees to preserve their security, would have been exactly the same as if the trustees had succeeded in carrying out the scheme of the first 12 articles of the agreement, and were about to make distribution of the trust fund to certificate holders under the twelfth article.

The trustees did not purchase upon the foreclosure of the second mortgage because a sale of the property was imminent. They did so because a sale, and a purchase by them under such a sale, would afford a convenient method of closing out their trust, and enable them to convey a satisfactory title to the new corporation. Of course they occupy no better position towards the complainant than they would if they had purchased pursuant to the conditions of the trust. They now insist, as they have insisted all along, that they owe no duty to the complainant, and that no one had any right to share in the proceeds of the trust fund arising under the agreement except certificate holders, or in the distribution of the property which they acquired by purchase. It does not follow because the complainant had no interest in the trust fund, and was not entitled to share in its distribution after he had parted with his certificate, that the trustees owed him no duty respecting the unsurrendered two-thirds of his bonds. They undertook to become his trustee for the purpose of protecting, as well as could practically be done, his interest as a secured bondholder of the company, to the extent of two-thirds of his original security, in consideration of his becoming a subscriber to the agreement. If this is not a correct view of the relation they promised to assume towards the construction bondholders, what inducement did the agreement offer to holders of such bonds to join in it? Their mortgage was a prior lien to the income mortgage of \$3,200,000. They were to have nothing for relinquishing one-third of their security except an equal share in the trust fund with the income bondholders, and a proportionate share with creditors and stockholders. They were to have but comparatively little participation in the management and control of the fund, because they would be but a minority of the voting power. Obviously, one of the main inducements which led them to sign was the consideration that the trustees, who were to undertake the readjustment of the affairs of the company, should become their trustees, for the protection of their interests as bondholders, in carrying out the details of the scheme.

The sixteenth article of the agreement indicates very conclusively that every subscriber to the agreement, whether bondholder or stockholder, was to be protected in the event of a purchase of the property by any other subscriber, directly or indirectly, which would include a purchase by the trustees. Under this article it would have been the privilege of the complainant to surrender his remaining six bonds under the seventh article of the agreement, and receive a certificate for their amount. Thus, the agreement was carefully devised to protect every subscriber to the full extent of his interest, both as bondholder and certificate holder, in the event that the trustees might be unable to protect him. That contingency did not occur, but the trustees themselves purchased the property. They could acquire no better rights upon such a purchase against the complainant than could have been acquired by any other purchaser who had become a party to the agreement.

There is nothing in the provisions of the agreement conferring upon certificate holders the right, by a majority vote, at general meetings or special meetings called for the purpose, to modify the conditions of the agreement which affect the rights of the complainant as a holder of bonds. It was evidently contemplated by the agreement that those who surrendered their claims to the trustees were, to the extent of claims surrendered, to be placed upon the footing of stockholders of the company. They were ultimately to receive stock in proportion to the amount of their respective surrendered claims. While the readjustment was pending, they were to be permitted to exercise the powers ordinarily exercised by stockholders in directing and controlling the trustees, who, through the stock in their hands, were, in turn, to direct and control the affairs of the corporation. The trustees were therefore, in effect, representing a body of *quasi* stockholders. But neither certificate holders nor trustees were invested with any authority to extinguish or impair the rights of bondholders whose claims against the corporation were paramount to any equities which stockholders could acquire in its property.

The obligations assumed by the trustees towards bondholders in the position of the complainant are not to be found in any of the express provisions of the trust agreement. These provisions are mainly intended to define the powers and duties of the trustees in administering the trust fund which should come to their hands, and the rights and interests of those entitled to participate in it. The duties incumbent upon the trustees in the protection of the complainant grow out of the character of the relations which they assumed towards every person who became a party to the agreement. They undertook to use their best exertions for the financial rehabilitation of the company, without requiring any sacrifice on the part of construction bondholders beyond that of one-third of their holdings. The complainant had a right to reply upon the faithful discharge of that obligation. The trustees were placed, by his consent, in part, in a

position which enabled them to control the financial situation. They did control it; but, after they had acquired control, used the opportunity to subordinate his rights to the interests of the certificate holders. It is by no means certain that the complainant cannot enforce his bonds against the new corporation as an equitable lien upon its property. Whether this is so or not, he can look to the trustees personally by whose acts his lien upon the property of the company was subverted.

The defendant Whitewright did not become a trustee until July 27, 1867, after the purchase by the trustees at the foreclosure sale. One of the original trustees had died, and Whitewright was elected to fill the vacant place in order to join with the other trustees in a conveyance of the property to the new corporation. The eighteenth article of the trust agreement provides that neither of the trustees shall be responsible for the act or omission of any of his associates, or for any act not willfully or grossly negligent. This article merely expresses what a court of equity would hold in the absence of such a provision. *Worrall v. Harford*, 8 Ves. 8; *Dawson v. Clarke*, 18 Ves. 254; *Clough v. Dixon*, 8 Sim. 594; *Peter v. Beverly*, 10 Pet. 532; *Latrobe v. Tiernan*, 2 Md. Ch. 474. When Whitewright consented to step into the place of a prior trustee, it was his duty, before joining in any disposition of the property of the trust fund, to ascertain whether the act he was about to perform would be prejudicial to any of the *cestuis que trust* whom he represented. The legal lien of the complainant under the construction mortgage upon the mortgaged property was cut off by the sale under the foreclosure of the prior mortgage. His equitable lien remained, however, until the property was conveyed to a purchaser for value, and without notice. Whether the new corporation was such a purchaser may be doubtful; but however this might be, the effect of the conveyance was to introduce new owners, and compel the complainant to follow the property into the hands of strangers, under complications which it is not incumbent upon him to unravel.

A decree is ordered for complainant for the value of his bonds at the time of the conveyance, with interest.

MAY v. WESTERN ASSUR. Co.¹

(Circuit Court, D. Minnesota. 1886.)

FIRE INSURANCE—AUTHORITY OF AGENT—LOSS.

A. applied to B., an insurance agent, who had been carrying his insurance for a series of years, and who knew the condition of his property, for \$20,000 of insurance, and B., being unwilling to carry that amount in the companies he represented, applied to C., the agent of another company, for \$2,500 of insurance, and C., without any communication with A., or knowledge of the property, took the insurance, wrote out the policy, and delivered it to B., who gave it to A. *Held*, that the company represented by C. was bound by the policy, and was liable for a loss.

Motion for New Trial. The opinion states the facts.

Wilson & Lawrence, for plaintiff.

Cole & Bramhall, for defendant.

BREWER, J. In this case it appears that the plaintiff, Mr. May, went to Judge Ames, an insurance agent in Minneapolis, who had been carrying his insurance for a series of years, and told him that he wanted \$20,000 of insurance. Judge Ames knew the condition of the property, and he afterwards handed in to the plaintiff \$20,000 of insurance; but Judge Ames, it seems, was unwilling to carry that amount in the company or companies that he represented, and therefore went to the agent of the defendant, Mr. Seeley, and offered him \$2,500 of it, and Mr. Seeley took the insurance, wrote out the policy, and sent it to Judge Ames' office, and Judge Ames thereupon delivered it to the plaintiff. Mr. Seeley, as the agent of the defendant, did not know the condition of the risk, and he had no communication with the plaintiff. The question was whether Judge Ames was the agent of the plaintiff to solicit the insurance, and whether Mr. Seeley, as agent of the defendant, should have been informed by him of the condition of the risk, or whether the defendant company was bound by the knowledge that Judge Ames had,—whether his knowledge of the condition of the risk, under the circumstances, was the same as the knowledge of their agent, and binding upon the company.

It seems to me, from whichever stand-point you approach this case, that it would not be fair to release the defendant company from liability. The plaintiff did not go to an insurance broker to employ him to solicit insurance. He never thought of employing an agent to act for him; but he, as principal, wanting to buy insurance, went to a man who was selling insurance, and proposed to buy from him \$20,000 worth of insurance. Judge Ames proposed to sell it to him, and they each stood in the relation of principal in that negotiation. There is no pretense that when the policies were delivered to the plaintiff any actual notice was given him that Mr. Seeley alone was the

¹Reported by Robertson Howard, Esq., of the St. Paul bar.

agent of the defendant, and the fact that Seeley's name was written across the back of the policy as agent of the defendant is not sufficient to charge the plaintiff with such knowledge. It seems to me that something more was necessary in order to change the relations the parties expressly assumed towards each other than the implication which would arise from the fact that another party's name was written on the policy as agent.

Now, approaching it from the stand-point of the defendant company. They put Mr. Seeley there as their general agent. If he sends out a man to make an examination of a risk, and accepts the representations made to him by such subagent, the company is bound by it. It is not to be expected that a general agent, located in a city like Minneapolis, can personally go and examine all the risks offered him. The business must, of necessity, be done through subagents principally; and the testimony is that the custom was for agents to go to other agents, and divide insurance with them, when they had more offered them than they cared to carry themselves. Mr. Seeley testifies that that was his custom. If the agents coming to him took part of the risk for their own companies, he relied on that and wrote out the policies. It seems to me to be a very natural custom, and if the insurance company is willing to allow its general agent, put in charge there, to determine what means of investigation he will rely upon, and he relies upon the investigations or statements of other agents, the insurance company has no right to complain. Whatever Mr. Seeley does within the reasonable scope of the powers committed to him is binding upon the company. If, instead of making an examination himself, he prefers, or is willing, to take the representations of another insurance agent, the company is bound by that act. The particular case cited by the appellant from 58 Md. does not seem to me, by any means, to touch the points in this case.

I think the ruling made by my Brother NELSON was right.

Motion for new trial overruled.

STATE *ex rel.* FELDKAMP v. MORSE and others.¹

(Circuit Court, E. D. Missouri. April 5, 1886.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES—REV. ST. MO. § 354.

A debtor has a right to prefer one creditor to the exclusion of others, but where the preferred creditor receives the bulk of the debtor's property in payment of his claim, knowing that the debtor is about to make a general assignment, the assignment to him is void, under the Missouri Statutes, and he can only take his share under the general assignment.

At Law.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

Suit upon an indemnity bond given the United States marshal to indemnify him and F. Feldkamp against all damages and costs that might accrue to them by reason of the seizure and sale of certain property, claimed by said Feldkamp, to satisfy an execution issued in the case of *Morse v. Frank*. The other material facts are sufficiently stated in the charge to the jury.

A. Binswanger, for plaintiff.

Dyer, Lee & Ellis, for defendants.

TREAT, J., (*charging jury orally*.) Gentlemen of the jury, you understand the main inquiry before you is whether this property belonged to Feldkamp, which was seized by the marshal to pay the debt of Morse. If you think it was Feldkamp's property, the defendant must pay back the value of that property, with interest from the time it was taken, the valuation being fixed according to the appraisement at \$1,544.25,—the parties differing with regard thereto.

But the next inquiry is this: Was this a transaction in good faith, by which Mr. Feldkamp, being a creditor of Frank & Sons, took this property in payment of a debt justly due him? or was it a fraudulent transaction, whereby he was to take possession of this property for the benefit of Frank & Sons, and through contrivances thereafter, as by having a new firm formed, having some other name, and turning the property back to that firm in order to cover the property for the benefit of Frank & Sons?

In examining these questions there is another element which is worth while always to consider: What was the value of Frank & Sons' estate? What were they to do with it? Did they turn it out to one or two creditors? It seems there were two creditors who received the main portion of the goods, leaving out of the transaction all the other creditors. The amount of indebtedness is stated to be between \$10,000 and \$11,000. Two of the creditors secured their demands, and the others secured what they could get out of an assignment. Now there have been before this court for the last two years a great many inquiries in regard to these matters, and we have been waiting for the supreme court of the state of Missouri to interpret the state statute. This court has held, and will continue to hold, until the state statute is interpreted otherwise, that where parties come, just on the eve of a collapse, and take the estate, knowing that an assignment is about to be made, they cannot hold against other creditors, because the law as interpreted by this court is that they shall all share alike.

A man, in the ordinary course of business, has a right to turn out goods for the payment of his debts; but when the final collapse is impending, and he knows it, a transfer of the entire estate to one creditor cannot be upheld, and the latter can only take his share of the estate under the subsequent assignment.

The court mentions this, because in considering this matter you

must look back and consider the *status* of the parties in this case. Here were Frank & Sons, and Feldkamp, a friend, as it seems, who had helped them along. Very naturally they would wish to secure him in preference to anybody else. If he knew that they were about to go overboard, and he chose to sweep the bulk of the assets in liquidation of his demands, and leave but a little fragment of the rest, the court will pronounce it a voidable transaction.

If you find for the plaintiff, you must give him the value of these goods from the eighth of April last, with interest to the present time.

Mr. Binswanger. Will your honor instruct the jury that they had the right to prefer one creditor to the exclusion of others?

The Court. Certainly; unquestionably. I think the jury understand that; but when that particular creditor knows this preference is to be accompanied by an assignment right away, and takes the whole of the estate, he cannot hold it. This thought has been running through my mind all the while. I did not think it worth while to trouble the jury in regard to it. What I mean is this: Mr. Feldkamp, as far as this case discloses, was an honest creditor for \$2,750, and the assignment taking place on the very day, or a day or so afterwards, and he, knowing that there was to be an assignment, should have taken a fair division with the other creditors; but he wants the whole, and the court says he cannot have it; that he must come in and divide with the rest.

Mr. Binswanger. Morse did the same thing that Feldkamp did.

The Court. We will attend to that. There may be a supplemental motion. Morse & Co. cannot do it. They will all have to come in on an equitable proceeding in connection with this judgment, and divide all around fairly.

Verdict for the defendants.

DANA, Ex'x, v. PARKER.

(Circuit Court, D. Massachusetts. April 9, 1886.)

ACTION—PARTIES—JOINT BOND.

S. L. B. and E. B. became sureties on a trustee's bond, and P. and H. executed a bond as sureties to indemnify them. E. B. indorsed on the trustee's bond an agreement to indemnify S. L. B. Subsequently the executrix of E. B. brought suit on the bond against P. *Held*, that as it did not appear that S. L. B., the joint obligee, was not living, the plaintiff was not the proper party to sue, and that the suit should be dismissed.

At Law.

A. S. Wait, for plaintiff.

Hutchins & Wheeler, for defendant.

COLT, J. In 1871 John H. Swasey, of Boston, applied to the probate court for the county of Grafton, in the state of New Hampshire, to be appointed trustee for Benjamin M. Swasey; and it being necessary for him to furnish two sureties, residents of New Hampshire, upon his bond, Edmund Burke, the plaintiff's testator, and Shepherd L. Bowers agreed to become sureties, provided they were secured by a bond of indemnity, with the defendant, Parker, and one Jacob Hittinger, as sureties thereon. The bond of indemnity was given, and is the subject-matter of the present suit. The suit is brought by the executrix of Burke, one of the two joint obligees, against Parker, one of the sureties on the bond. The case comes before the court on an agreed statement of facts. At the outset the objection is raised by the defendant that the plaintiff is not the proper person to bring the action. We think the objection well taken. It does not appear but what Bowers, the joint obligee, is living, and, if so, he is the proper person to bring suit, for, Burke being dead, the right of action survives to the other joint obligee. Dicey, Parties, 128; *Donnell v. Manson*, 109 Mass. 576. "It is an elemental principle of the common law that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-joinder of plaintiffs, not only by demurrer, but in arrest of judgment, under the plea of the general issue." *Farni v. Tesson*, 1 Black, 309, 315.

The fact that Burke indorsed on the bond of indemnity an agreement to indemnify Bowers cannot affect the question now raised, nor can it be said that the agreement of facts operated as a waiver of this objection, because the legal right to bring the action does not exist in the plaintiff, but in Bowers, the surviving joint obligee. Suit dismissed.

TAYLOR v. RICE.

(Circuit Court, D. Indiana. March 31, 1886.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE—NEW TRIAL.

On examination of the evidence, *held*, that there was probable cause for the prosecution.¹

Motion for New Trial.

Cyrus McNutt and Delana E. Williamson, for plaintiff.

J. W. Gordon and McDonald, Butler & Mason, for defendant.

WOODS, J. By the form of his complaint the plaintiff assumed the burden, presumably difficult, of showing that the plaintiff went

¹ See note at end of case.

before the grand jury of Parke county and maliciously testified falsely, and procured others to testify, that the defendant, upon the person of the woman named, had produced a criminal abortion and miscarriage, resulting in the death of both woman and child, and by means of said false evidence had maliciously, and without probable cause, procured the indictment of the plaintiff for the crime of abortion.

There is a clear lack of evidence to support this charge as made; indeed, if a strict construction of the complaint had been insisted upon at the trial, the court would probably have deemed it proper to direct a verdict for the defendant; but the case having been argued before the jury upon the conceded theory that the second paragraph of the complaint contains a separate charge against the defendant of wrongful assistance to the prosecution, rendered after the indictments had been found, it was deemed proper to submit that issue, and the others with it, to the consideration of the jury. Defendant's counsel now insist, and I agree with them, that this charge is not well laid, because it is not shown that the alleged assistance was rendered maliciously and without probable cause. If, however, there were no other objection to the verdict, I should be inclined to hold the defendant estopped to make this one. But limiting the case, as I think it clearly must be limited, to the charge of assistance at the trial, I should feel constrained to declare the damages excessive. Even, if the evidence were sufficient to support the charge that the defendant originated as well as aided the prosecution, the award would, under the circumstances in proof, be well up to, if not above, the line which would challenge consideration whether or not the jury had been swayed by passion, resentment, or other undue influence.

That this verdict was not the result of a dispassionate consideration of the evidence seems to me altogether probable; especially in the light of some of the arguments and appeals made to the jury. I allude more particularly to the denunciation of the defendant on account of the alleged desecration of the grave and body of the deceased woman, opened for the purpose of the official *post mortem* examination. This sacrilege, and the outraged feelings of the husband and son and kindred, as if the plaintiff stood for them all, and other considerations equally irrelevant to the rights of the litigants, were woven into multifarious appeals of such eloquence and force as to leave little room for wonder at the result. I am not to be understood as implying by the allusion made to this subject a criticism or reflection upon the conduct of counsel, nor as resting my decision upon this ground. I simply recognize the facts as they occurred, and find in them strong support for my conclusion, that for other reasons the verdict returned is not right.

In addition to the reasons stated, I am of opinion that the defendant had reasonable cause to believe the plaintiff guilty of the crime for which he was indicted. Omitting details, I will refer only to the

principal facts, or outlines of the case, as it was known, and must, or at least may reasonably be supposed to, have appeared to Dr. Rice. He was called to see Mrs. N. in consultation with Dr. Cross. Her previous symptoms, so far as then deemed material by her or her husband, and by Dr. Cross, were presumably made known to him. What they were is not disputed, and that they, in the main, indicated a state of pregnancy commenced in the previous August is quite clear. Mr. and Mrs. N., however, did not entertain, perhaps were unwilling to accept, that view of the case; and Dr. Cross, too, was uncertain. After a careful examination, no matter now just how made, Dr. Rice became certain upon the point, and informed Mr. and Mrs. N. of his conclusion; told her she had no organic trouble, and only needed to keep up courage, and she would be all right in a few months. Without doubt Dr. Rice believed the pregnancy to be with a live child. He discovered and was told nothing to raise the slightest doubt on that point; nothing of an unusual flow of water, nor of bad odors. The woman, for weeks, had suffered greatly with more or less constant nausea and vomiting, and was considerably weakened, and much of the time kept to her bed; but when Dr. Rice left he did not apprehend—saw no cause to apprehend—danger. No reason is apparent why Dr. R.'s view of the case should not have been accepted by Mr. N. as true, and as a sufficient explanation of the failure of previous treatment to afford relief from the nausea; but upon his next visit, two days afterwards, Dr. Cross was discharged, and on the evening of the same day the plaintiff and his father arrived, in obedience to a summons sent immediately after Dr. R.'s visit. The plaintiff and father were informed at once, it seems, of an unusually large discharge of water, which should have occurred two or three weeks before, and of bad odors from the woman's person,—facts which, strangely, were not told to Dr. Cross or Rice; and, upon examination, became convinced of the presence in the womb of either a false conception or a dead and decayed fetus. They claim, also, to have found the woman so far gone as to fear she would not live till morning, and, through motives of timidity, as they were strangers, did nothing for her the first night; and notwithstanding the only proper course, if there was a dead and decomposing fetus in the womb, was to proceed at once to remove it, for several days did nothing, as is claimed, but give brandy as a stimulant, and a drug to allay nausea, in the hope, apparently without foundation, that she might regain strength to expel the fetus without artificial aids. Finally, with the aid of Dr. Challenger, the elder Taylor having withdrawn from the case, the plaintiff resorted to the use of instruments,—what they were and just how used is put in some doubt,—and after the third operation accomplished the abortion. To what extent the fetus was decomposed, and of what age at its death, there were differences of opinion. For two or three days after the operation the woman seemed to regain strength, and to be

likely to get well, but at or near the end of a week she died. The plaintiff reported as the cause of death *pyæmia* in the lungs, resulting from blood poison caused by the dead fetus.

The death and its circumstances and cause became the subject of talk and discussion in the neighborhood. Dr. Rice, upon hearing of the death, declared that the Taylors had murdered the woman, and ought to be prosecuted, and pronounced the claim that the fetus had been long dead a lie. About this time the plaintiff wrote to Dr. Cross the letter which was put in evidence. That letter contains a statement which implies that the plaintiff was justified in producing the miscarriage in order to relieve the woman from nausea and vomiting which threatened her life; but this is followed immediately by the assertion that the fetus was dead and greatly decomposed. At the instance of Dr. Cross, supported or encouraged by Dr. Rice, the acting coroner caused a *post mortem* examination of the woman's body, and of the remains of the child. This examination was made by three physicians, assisted by Drs. Cross and Rice. They examined the woman's lungs, found them healthy in appearance, without a sign of *pyæmia*; but in the womb and adjacent parts they found inflammation sufficient to account for the death; and all have declared on oath their belief that the death was the direct result of that cause. If, in fact, the fetus had been dead so long as to become decayed, or if it was dead before the plaintiff commenced his effort to remove it, there is no apparent reason, and none has been suggested, why the plaintiff should have disputed the facts stated by these physicians, or that the cause of death was as they claim. Nevertheless, the plaintiff caused the body to be taken up a second time, and examined by a number of physicians of his own school, and, by the aid of the microscope, claimed to have found in the lungs evidence of *pyæmia* sufficient to have caused the death, and that in the womb and adjacent parts there was not such inflammation as to cause death. On the trial the plaintiff was corroborated in respect to this theory by one of his assistants at the examination. The others did not testify. It may be that Dr. Rice knew or had heard of other facts, circumstances, or statements than those mentioned, but, if so, not of such significance as to change essentially the nature of the case as outlined. While these facts and circumstances fall short of showing, beyond reasonable doubt, a case of criminal abortion, they are such as to evoke the gravest suspicions; and, in my judgment, strong enough to justify any good citizen, if he chose to do it, in moving the grand jury to an investigation; and, an indictment having been returned by that body, to warrant him in giving assistance to the prosecution.

New trial granted.

NOTE.

An action will lie for malicious prosecution against a party who causes the arrest of a person for the purpose of ascertaining who perpetrated an offense. *Johnson v. Ebberbs*, 11 Fed. Rep. 129. The malice necessary to sustain such an action is not express malice, a specific desire to vex or injure another from malevolence or motives of ill-

will, but the willful doing of an unlawful act, to the prejudice of another. *Johnson v. Ebberts*, 11 Fed. Rep. 129; *Frowman v. Smith*, Litt. Sel. Cas. 7. Malice in such a case is not to be presumed from want of probable cause; the jury must find the malice as a substantial fact in the case. *Johnson v. Ebberts*, 11 Fed. Rep. 129. See *Wheeler v. Nesbitt*, 24 How. 551; *Stewart v. Sonneborn*, 98 U. S. 191; *Levy v. Brannan*, 39 Cal. 488. If an imprisonment is under legal process, but the action has been commenced and carried on maliciously, and without probable cause, it is malicious prosecution. *Murphy v. Martin*, (Wis.) 16 N. W. Rep. 603; *Colter v. Lower*, 35 Ind. 285. Where defendants were members of an association that wrongfully, and without probable cause, instituted criminal proceedings against the plaintiff, and personally acted in furtherance of the unlawful act, they were held responsible. *Johnson v. Miller*, (Iowa,) 17 N. W. Rep. 34. Prosecution of an innocent person, without using reasonable care to ascertain the facts, is not justifiable. *Walker v. Camp*, (Iowa,) 19 N. W. Rep. 802. It has been held that one who wrongfully causes a criminal action to be commenced is liable for the proceeding in and continuance of the same. *Johnson v. Miller*, (Iowa,) 17 N. W. Rep. 34; *Bacon v. Towne*, 4 Cush. 217. Approving arrest of debtor by creditor caused by party acting for him renders liable for actual damages sustained. *Rosenkranz v. Barker*, (Ill.) 3 N. E. Rep. 93; *Grund v. Van Vleck*, 69 Ill. 478. It has been said that a partner cannot be held liable for the arrest of a debtor by a copartner, when he neither directs, participates in, nor receives any benefit from, such arrest. *Rosenkranz v. Barker*, (Ill.) 3 N. E. Rep. 94. See *Gilbert v. Emmons*, 42 Ill. 143; *Grund v. Van Vleck*, 69 Ill. 478. And where a debt has been transferred to parties outside of the state, where, by appropriate judicial proceedings, it is collected with greater facility and more effectually than it could have been done in the state, no action for damages will lie therefor, even though the debtor may have been annoyed and put to additional inconvenience by such transfer. *Uppinghouse v. Mundel*, (Ind.) 2 N. E. Rep. 719.

1. **PROBABLE CAUSE.** Probable cause not existing as to the party who instigated the prosecution, the fact that the party who made the criminal complaint had probable cause to believe it true, is no defense. *Woodworth v. Mills*, (Wis.) 20 N. W. Rep. 728. In actions for malicious prosecution the want of probable cause and malice must concur, and the defendant is allowed, if he can, to disprove either. *Sherburne v. Rodman*, (Mich.) 8 N. W. Rep. 414; *Spain v. Howe*, 25 Wis. 625; *Plath v. Braunsdorff*, 40 Wis. 107; *McKown v. Hunter*, 30 N. Y. 625. Where defendant had probable cause for believing plaintiff guilty of the crime charged, it mattered not how maliciously he may have acted in instituting and prosecuting the case, he is not liable. *Murphy v. Martin*, (Wis.) 16 N. W. Rep. 603.

It was held by the supreme court of Michigan, in the case of *Smith v. Austin*, 13 N. W. Rep. 593, that an action for malicious prosecution cannot be maintained against the complainant in a criminal proceeding for which there was probable cause, no matter how evil or malicious his motive may have been in making the complaint. *Hamilton v. Smith*, 39 Mich. 222. Also, that it cannot be maintained if complainant, after fully and fairly disclosing to the prosecuting officer everything within his knowledge which would tend to cause or to exclude belief in plaintiff's criminality, left him to determine, on his sole responsibility, whether the proceedings should be instituted, even though the case were not a proper one for prosecution.

(1) *Definition of.* Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. *Ross v. Langworthy*, (Neb.) 14 N. W. Rep. 515; *Boyd v. Cross*, 35 Md. 197; *Cooper v. Utterbach*, 37 Md. 282. Probable cause is "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Walker v. Camp*, (Iowa,) 19 N. W. Rep. 802; *Wheeler v. Nesbitt*, 24 How. 544; *Barron v. Mason*, 31 Vt. 189.

(2) *Want of Probable Cause.* By a "want of probable cause" is meant an absence of rational grounds of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious and reasonable man in the belief that the person accused is guilty of the crime charged. *Davie v. Wisher*, 72 Ill. 262. "The question of what constitutes probable cause," say the supreme court of New York, in *Fagnan v. Knox*, 66 N. Y. 525, "does not depend upon whether the offense has, in fact, been committed, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. *Bacon v. Towne*, 4 Cush. 238. The prosecutor may act upon appearances; and if the apparent facts are such that a discreet and prudent man would be led to the belief that the accused had committed a crime, he will not be liable in the action, although it may turn out that the accused was innocent. *Carl v. Ayers*, 53 N. Y. 17. If there be an honest belief of guilt, and if there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will ex-

plain the suspicious appearance, and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence." In an action for damages for malicious prosecution in procuring plaintiff to be indicted for perjury, an averment in the petition which clearly and distinctly alleges that the defendant maliciously and without probable cause procured the indictment to be found sufficiently avers the want of probable cause. *Hampton v. John*, (Iowa,) 12 N. W. Rep. 276.

In action for malicious prosecution plaintiff must establish the want of probable cause. *Dwain v. Descalso*, (Cal.) 5 Pac. Rep. 903. Want of probable cause will not be inferred from even express malice, *Wheeler v. Nesbitt*, 24 How. 544; but must be proved by plaintiff. *Good v. French*, 115 Mass. 201; *Levy v. Brannan*, 39 Cal. 485.

(3) *What Amounts to.* It is enough if the prosecutor acted with such a degree of impartiality, reasonableness, and freedom from prejudice as can fairly be expected of a man of ordinary prudence and caution, acting without malice. *Casey v. Sevaton*, (Minn.) 16 N. W. Rep. 407. See *Cole v. Curtis*, 16 Minn. 182, (Gil. 161;) *Bacon v. Towne*, 4 Cush. 238; *McGurn v. Brackett*, 33 Me. 331. It is said that if the evidence on the trial of the criminal charge is such as to cause the jury to hesitate as to an acquittal, it was evidence of probable cause. *Johnson v. Miller*, (Iowa,) 17 N. W. Rep. 34; *Smith v. MacDonald*, 3 Esp. 7. Mere suspicions, without reasonable ground for believing them to be founded in fact, will not amount to a probable cause. *Hirsch v. Feeney*, 83 Ill. 548. Real belief and reasonable ground must unite to afford a justification. *Farnam v. Feeley*, 56 N. Y. 451. It is said that a conviction before a magistrate of assault and battery does not show probable cause for having instituted an action for assault with intent to kill. *Labar v. Crane*, (Mich.) 14 N. W. Rep. 495.

(a) *Belief of Prosecutor.* Probable cause does not depend upon mere belief, however sincerely entertained. The law imposes the additional requisite of such facts as would induce a reasonable man to believe the accused was guilty, and nothing short of this will justify the institution of criminal proceedings. *Ross v. Langworthy*, (Neb.) 14 N. W. Rep. 515; *Cooley, Torts*, 182. Neither does it depend upon the guilt or innocence of the accused, but upon the prosecutor's belief in it at the time of prosecution, upon reasonable grounds. *King v. Colvin*, 11 R. I. 582; *Foshay v. Ferguson*, 2 Denio, 617; *Burlingame v. Burlingame*, 8 Cow. 141; *Scanlan v. Cowley*, 2 Hilt. 489; *French v. Smith*, 4 Vt. 363; *Swaim v. Stafford*, 3 Ired. 289; *Johnson v. Chambers*, 10 Ired. 287; *Raulston v. Jackson*, 1 Sneed. 128; *Faris v. Starke*, 3 B. Mon. 4; *Delegal v. Highley*, 3 Bing. (N. C.) 950; *Jacks v. Stimpson*, 13 Ill. 701; *Wade v. Walden*, 23 Ill. 425. Although the facts known make out a *prima facie* case of guilt, yet, if the circumstances are all consistent with the innocence of the party, and the prosecutor knows the accused is not guilty, or does not believe him to be guilty, he cannot have reasonable cause for the prosecution. *Woodworth v. Mills*, (Wis.) 20 N. W. Rep. 728. See *Turner v. Ambler*, 10 Q. B. 252; *Broad v. Ham*, 5 Bing. (N. C.) 722; *Fagan v. Knox*, 1 Abb. (N. C.) 246; *Townsh. Sland. & Lib.* § 428, p. 715.

The court say, in *Sherburne v. Rodman*, *supra*, that "the intent, good faith, and honest belief of the defendant are mental conditions which can be proved only indirectly, presumptively, and inferentially by the facts and circumstances of the case; but malice being a fact to be proved and directly in issue, since parties are allowed to be witnesses there seems to be no good reason why the party alone cannot positively and directly know and testify to such fact." See *Wilson v. Noonan*, 35 Wis. 321. And it has been held that an action for malicious prosecution will lie "if the defendant knew that the charge was false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial, even though the charge made did not constitute the crime alleged or any crime." This seems to be the general doctrine in this country. See *Stone v. Stevens*, 12 Conn. 219; *Hays v. Younglove*, 7 B. Mon. 545; *Stancliff v. Palmeter*, 18 Ind. 321; *Stocking v. Howard*, 24 Alb. Law J. 537; *Sweet v. Negus*, 30 Mich. 406; *Collin v. Love*, 7 Blackf. 416; *Forrest v. Collier*, 20 Ala. 175; *Braveboy v. Cockfield*, 2 McMul. 270; *Gibbs v. Ames*, 119 Mass. 60. Evidence of admission of defendant that he was the instigator of the prosecution, and that it was without probable cause, is competent. *Woodworth v. Mills*, (Wis.) 20 N. W. Rep. 728.

(b) *Discharge by Justice or Ignoring by Grand Jury.* It is held by some courts that where the accused was discharged by the examining magistrate, or the bill was ignored by the grand jury, such fact is evidence of want of probable cause. *Sappington v. Watson*, 50 Mo. 83. But the better, as well as the more general, doctrine is that a justice's finding is not final as to probable cause. *Spalding v. Lowe*, (Mich.) 23 N. W. Rep. 46. It has been said that an entry made in his docket by a justice of the peace before whom a criminal cause was tried, declaring the suit instituted maliciously and without probable cause, is not admissible in action for malicious prosecution. *Casey v. Sevaton*, (Minn.) 16 N. W. Rep. 407. See *Granger v. Warrington*, 3 Gilman, 299.

(c) *Discharge by Nolle Prosequi, etc.* It has been said that a discharge from the prosecution by a *nolle prosequi* is not *prima facie* evidence of want of probable cause. *Yocum*

v. Polly, 1 B. Mon. 358; Flickinger v. Wagner, 46 Md. 580; but it is held that dismissing an action voluntarily is *prima facie* evidence of want of probable cause. Wetmore v. Mellinger, (Iowa,) 14 N. W. Rep. 722; Green v. Cochran, 43 Iowa, 544; Burhans v. Sandford, 19 Wend. 417.

(d) *Finding "True Bill" by Grand Jury.* It is said that the finding of a "true bill" or indictment by a grand jury is *prima facie* evidence of probable cause, Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; Garrard v. Willet, 4 J. J. Marsh. 628; although such prosecution may have resulted in an acquittal. Id. It is said that an action for malicious prosecution may be founded on an indictment whereon no acquittal can be had because *coram non iudice*, insufficiently drawn, or the like; for it is not the danger of the plaintiff, but the scandal, vexation, and expense upon which the action is founded. Castro v. De Uriarte, 12 Fed. Rep. 250. See Goslin v. Wilcock, 2 Wils. 302; West v. Smallwood, 3 Mees. & W. 418; Wicks v. Fentham, 4 Term. R. 247; Pippet v. Hearn, 5 Barn. & Ald. 634; 3 Bl. Comm. 127.

(e) *Conviction by Court of Competent Jurisdiction.* Conviction of a party charged with a crime is not conclusive in an action for malicious prosecution, upon the question of probable cause for prosecution; but may be rebutted by proof that the same was prosecuted by false and malicious testimony. Bowman v. Brown, (Iowa,) 3 N. W. Rep. 609; Moffatt v. Fisher, 47 Iowa, 473. And it is held that a conviction before a justice of the peace is only *prima facie* evidence of probable cause. Bowman v. Brown, (Iowa,) 3 N. W. Rep. 609; Olson v. Neal, (Iowa,) 18 N. W. Rep. 863. See Ritchey v. Davis, 11 Iowa, 124; Moffatt v. Fisher, 47 Iowa, 473; 2 Greenl. Ev. § 457.

Yet it has been held that the judgment of a court of competent jurisdiction finding the accused guilty is conclusive evidence of probable cause, Whitney v. Peckham, 15 Mass. 243; Cloon v. Gerry, 13 Gray, 203; Dennehey v. Woodsum, 100 Mass. 197; but to bring the case within this rule the justice must have acted judicially and not ministerially, and the result have been reached without artifice, fraud, or collusion. Com. v. Davis, 11 Pick. 432; Kaye v. Kean, 18 B. Mon. 839; Herman v. Brookerhoff, 8 Watts, 240. In other cases it is held only to be *prima facie* evidence when reversed on appeal. Goodrich v. Warner, 21 Conn. 432; Womack v. Circle, 29 Grat. 192. See Burt v. Place, 4 Wend. 591.

And it has been held that a conviction before a justice of the peace on a criminal charge, although there was an acquittal upon appeal, is conclusive evidence of probable cause. Whitney v. Peckham, 15 Mass. 243; Witham v. Gowen, 14 Me. 362. But it is said in Bacon v. Towne, 4 Cush. 217, the authority of the first case has been doubted in Burt v. Place, 4 Wend. 591, and that if the conviction before the justice is regarded "as evidence of probable cause, we think it is *prima facie* only, and not conclusive." This is the doctrine in Iowa. Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; Moffatt v. Fisher, 47 Iowa, 473. But it is said by the supreme court of Michigan, in Phillips v. Village of Kalamazoo, 18 N. W. Rep. 547, that, as a rule, a conviction before a magistrate, even though reversed on appeal, is a bar to a suit for malicious prosecution. See Cooley, Torts, 185.

(f) *Mixed Question of Law and Fact.* What constitutes probable cause is a mixed question of fact and law. Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; Gee v. Culver, (Or.) 6 Pac. Rep. 775; Murray v. McLane, 5 Hall, Law J. 515; Nash v. Orr, 3 Brev. 94; Stone v. Crocker, 24 Pick. 81; Travis v. Smith, 1 Pa. St. 234; Hill v. Palm, 38 Mo. 18; Cole v. Curtis, 16 Minn. 182, (Gil. 161); Driggs v. Burton, 44 Vt. 124. It is for the jury to say what facts are proved, and it is for the court to say whether those facts constitute probable cause. Ross v. Langworthy, (Neb.) 14 N. W. Rep. 515; Turner v. O'Brien, 5 Neb. 547; Johns v. Marsh, 9 Rep. 143; Boyd v. Cross, 35 Md. 194. Thus, it is said that the question of probable cause is one of law for the court, Parli v. Reed, (Kan.) 2 Pac. Rep. 635, and the question of malice is for the jury. Parli v. Reed, (Kan.) 2 Pac. Rep. 635; Malone v. Murphy, 2 Kan. 250. What is probable cause is a question of law, to be determined from the facts as found by the jury. Eastin v. Bank of Stockton, (Cal.) 4 Pac. Rep. 1106.

(4) *Practice.* The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law. It is therefore generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. Castro v. De Uriarte, 16 Fed. Rep. 93; Stewart v. Sonneborn, 98 U. S. 187; Heyne v. Blair, 62 N. Y. 19; Sutton v. Johnstone, 1 Term R. 493. It is said that the court should group the facts together in the instructions which the evidence tends to prove, and then instruct the jury, if they find such facts have been established, they must find there was or was not probable cause. Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; Owen v. Owen, 22 Iowa, 271; Shaul v. Brown, 28 Iowa, 37; Gee v. Culver, (Or.) 6 Pac. Rep. 775; Haddrick v. Heslop, 12 Q. B. 275. And where facts are undisputed, the court should instruct the jury that there was or was not

probable cause. *Fulton v. Onesti*, (Cal.) 6 Pac. Rep. 491; *Harkrader v. Moore*, 44 Cal. 152; *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Commissioners v. Clark*, 94 U. S. 278, 284; *Parli v. Reed*, (Kan.) 2 Pac. Rep. 635; *Besson v. Southard*, 10 N. Y. 240; *Stone v. Crocker*, 24 Pick. 81; *Travis v. Smith*, 1 Pa. St. 234; *Hill v. Palm*, 38 Mo. 13; *Wells v. Parsons*, 3 Har. (Del.) 505; *Wells, Law & Fact*, § 291.

(5) *Intent*. Where intent or motive is involved in the issue, the person to whom such intent or motive is imputed is a competent witness, unless rendered incompetent by some statutory inability. *Spalding v. Lowe*, (Mich.) 23 N. W. Rep. 46; *Watkins v. Wallace*, 19 Mich. 57. In an action for malicious prosecution and false arrest, the defendant may prove the bad reputation of the plaintiff to rebut the want of probable cause. *Rosenkranz v. Barker*, (Ill.) 3 N. E. Rep. 93; *O'Brien v. Frasier*, (N. J.) 1 Atl. Rep. 465. See *Israel v. Brooks*, 23 Ill. 575; *Bacon v. Towne*, 4 Cush. 240; *Pullen v. Glidden*, 68 Me. 563; *Fitzgibbon v. Brown*, 43 Me. 169; 3 *Suth. Dam.* 708.

(6) *Advice of Counsel*. Where a party has communicated to his counsel all the facts bearing on the case, of which he had knowledge, or which he could have ascertained by reasonable diligence, and has, in good faith, acted upon the advice received, a want of probable cause will be negatived, and the party will not be held liable, *Walter v. Sample*, 25 Pa. St. 275; *Wicker v. Hotchkiss*, 62 Ill. 107; *Anderson v. Friend*, 71 Ill. 475; *Davie v. Wisher*, 72 Ill. 262; *Ash v. Marlow*, 20 Ohio, 119; *Eastman v. Keasor*, 44 N. H. 519; *Hill v. Palm*, 38 Mo. 13; but he must act in good faith after stating all the facts, and the advice must be given honestly and in good faith, *Sherburne v. Rodman*, (Wis.) 8 N. W. Rep. 414; see *Plath v. Braunsdorff*, 40 Wis. 107; for advice of counsel is of no avail as a defense unless defendant acted in good faith in instituting the suit, *Wetmore v. Mellinger*, (Iowa,) 14 N. W. Rep. 722; *Center v. Spring*, 2 Iowa, 393; and in suits for malicious prosecution the advice of counsel is referable rather to the issue of malice than the want of probable cause. If the jury can see, from all the facts, that the suit was malicious, notwithstanding the advice of counsel, that fact affords no protection. *Brewer v. Jacobs*, 22 Fed. Rep. 217.

It is said in *Walter v. Sample*, 25 Pa. St. 275, that "professors of the law are proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Where the fact of probable cause is in the very question submitted to counsel in such cases, and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party it is important that he should resort to a professional adviser of competency and integrity. He is not, in the language of Judge ROYES, to make such resort 'a mere cover for the prosecution;' but, when he has done his whole duty in the premises, he is not to be made liable because the facts did not clearly warrant the advice and prosecution. * * * Suppression, evasion, or falsehood would make him liable; but if fairly submitted, and if the advice obtained was followed in good faith, he has a defense to the action."

(a) *Advice of District Attorney*. The rule is the same where the defendant acted under the advice of the district attorney. *Thompson v. Lumley*, 50 How. Pr. 105. It is for the jury to say whether a defendant stated all the material facts to a prosecuting attorney. *Johnson v. Miller*, (Iowa,) 19 N. W. Rep. 310.

(b) *Advice of Justice of Peace*. It is no defense in an action for malicious prosecution that the defendant laid the facts within his knowledge before a justice of the peace and acted on his advice. *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; *Sutton v. McConnell*, 46 Wis. 269; *Olmstead v. Partridge*, 16 Gray, 381; *Brobst v. Ruff*, 100 Pa. St. 91. Notwithstanding, it is the defendant's duty, on applying to justice for warrant, to state all of the facts and circumstances. *Chapman v. Dunn*, (Mich.) 22 N. W. Rep. 101.

(7) *Public Officer*. A public officer, acting under the direction of his government to procure the extradition of a particular person for a crime charged, has probable cause for believing the person so charged guilty, and of assigning the act as committed since the statute or treaty making such act a crime was passed or ratified. *Castro v. De Uriarte*, 16 Fed. Rep. 93. A warrant of arrest pending preliminary hearing in extradition proceedings is not void because no preliminary mandate has been obtained, unless the statute or treaty makes such preliminary mandate prerequisite. *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Case of Farez*, 7 *Blatchf.* 34, 46; *Case of Thomas*, 12 *Blatchf.* 370. See *In re Kelley*, 2 *Low.* 339. A warrant for the arrest of one charged with a crime which follows the words of the statute or treaty in designating the crime charged, without further particulars, is sufficient. *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Case of Macdonnell*, 11 *Blatchf.* 79, 88; *Payne v. Barnes*, 5 *Barb.* 465; *Atchinson v. Spencer*, 9 *Wend.* 62; *People v. Donohue*, 84 *N. Y.* 438; *Case of Terraz*, 4 *Exch. Div.* 63. It is said, in *Wheaton v. Beecher*, (Mich.) 13 *N. W. Rep.* 769, that an officer to whom a warrant is delivered is not bound to look behind it, if regular on its face and issued from a proper

jurisdiction; and if he executes it he cannot be held liable in a civil action for damages, though it be invalid.

(8) *Defective Process, etc.* When a matter is wholly beyond the jurisdiction of the committing magistrate, an action for malicious prosecution will not lie. *Castro v. De Uriarte*, 12 Fed. Rep. 260; see *Painter v. Ives*, 4 Neb. 126; *Sweet v. Negus*, 30 Mich. 406; except in cases where malicious falsehoods are put forward as the *gravamen*, and the arrest or other act of trespass be claimed as the consequence. *Newfield v. Copperman*, 47 How. Pr. 87; *Thaule v. Krekeler*, 81 N. Y. 423; *Von Latham v. Libby*, 38 Barb. 348; *Dennis v. Ryan*, 63 Barb. 145; *S. C. 65 N. Y. 385*. But one for false imprisonment will. *Gelzenleuchter v. Niemeyer*, (Wis.) 25 N. W. Rep. 442; *Murphy v. Martin*, (Wis.) 16 N. W. Rep. 603; *Colter v. Lower*, 35 Ind. 285. An action for malicious prosecution will lie where the defendant falsely and maliciously procured the plaintiff to be adjudged a bankrupt upon an affidavit which was not sufficient legally to warrant an adjudication. *Farley v. Danks*, 4 El. & Bl. 493; *Oldfield v. Dodd*, 8 Exch. 578.

It was held in *Gibbs v. Ames*, 119 Mass. 60, where a plaintiff was brought to trial and acquitted, but without any previous proper complaint or proper warrant of arrest, that an action for malicious prosecution would lie. The court say: "This was a sufficient prosecution and acquittal therefrom to furnish a foundation for the common action for malicious prosecution, notwithstanding an insufficiency of the complaint, or defect of process by which she was brought before the court, or want of jurisdiction of the magistrate arising from such defect. The magistrate had jurisdiction of the subject-matter of the complaint, which was not the case in *Bixby v. Brundige*, 2 Gray, 129, and *Whiting v. Johnson*, 6 Gray, 246."

2. MALICE. Malice and want of probable cause on the part of the person instituting the prosecution is essential to support a suit for malicious prosecution, and should both concur. *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Yocum v. Polly*, 1 B. Mon. 358; *Mitchell v. Mattingly*, 1 Metc. (Ky.) 240; *Ullman v. Abrams*, 9 Bush, 744; *Woods v. Finnell*, 13 Bush, 628; *Kelton v. Bevins*, *Cooke*, (Tenn.) 90; *Bell v. Graham*, 1 Nott & McC. 278; *Smith v. Zent*, 59 Ind. 362; *Evans v. Thompson*, 12 Heisk. 534; *Scott v. Shelor*, 28 Grat. 891; *Carleton v. Taylor*, 60 Vt. 220; *McKown v. Hunter*, 30 N. Y. 625; *Peggan v. Knox*, 66 N. Y. 525. It is said that to maintain his case the plaintiff must prove malice in fact as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts; malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But the plaintiff is not required to prove express malice in the popular significance of that term; it is sufficient if he prove malice in the enlarged legal sense. Any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, in a legal sense, malicious. *Com. v. Snelling*, 15 Pick. 337. It has been said that "the malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malice. See *Wills v. Noyes*, 12 Pick. 324; *Page v. Cushing*, 38 Me. 523; *Humphries v. Parker*, 52 Me. 502; *Mitchell v. Wall*, 111 Mass. 492; *Pullen v. Glidden*, 66 Me. 202. The acquittal of the plaintiffs is not, of itself, evidence of malice on the part of the prosecutor, *Garrard v. Willet*, 4 J. J. Marsh. 628; *Ullman v. Abrams*, 9 Bush, 744; neither is a discharge from prosecution by *nolle prosequi*. *Yocum v. Polly*, 1 B. Mon. 358.

Malice must be alleged and proved as an independent fact, as well as want of probable cause. *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; *Mitchell v. Jenkins*, 5 Barn. & Adol. 593. The jury are the exclusive judges of the malice of the defendant. *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; *Munns v. Dupont*, 3 Wash. C. C. 37; *Stewart v. Sonneborn*, 98 U. S. 193. The law will not presume malice merely from an unfounded prosecution, *Edgeworth v. Carson*, (Mich.) 5 N. W. Rep. 282; *Dietz v. Langfitt*, 63 Pa. St. 234; for malice is never an inference of law, *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; but the jury may infer it as a deduction of fact from a want of probable cause, *Heap v. Parish*, (Ind.) 3 N. E. Rep. 549; *Edgeworth v. Carson*, (Mich.) 5 N. W. Rep. 282; *Burnhans v. Sanford*, 19 Wend. 417; *McKown v. Hunter*, 30 N. Y. 625; *Green v. Cochran*, 43 Iowa, 545; *Flickinger v. Wagner*, 46 Md. 581; *Wertheim v. Altschuler*, (Neb.) 12 N. W. Rep. 107; *Turner v. O'Brien*, 5 Neb. 542; 2 Greenl. Ev. § 453, note 1; *Bell v. Graham*, 1 Nott & McC. 278; *Garrard v. Willet*, 4 J. J. Marsh. 628; *Wood v. Weir*, 5 B. Mon. 544; *Mowry v. Whipple*, 8 R. I. 360; *Levy v. Brannan*, 39 Cal. 485; *Pullen v. Glidden*, 66 Me. 202; 2 Greenl. Ev. § 453; and a criminal intent is supplied by law where the wrong and injury result from the lack on the part of the defendant of that ordinary prudence and discretion which persons of sufficient age and sound mind are presumed in law to have. *Murphy v. Hobbs*, (Colo.) 5 Pac. Rep. 119.

Malice will be inferred when the object of the prosecution is to simply enforce the payment of a debt, *Ross v. Langworthy*, (Neb.) 14 N. W. Rep. 515; or any other purpose than that of bringing the party to justice. *Johns v. Marsh*, 9 Reporter, 143; *Mitchell v. Jenkins*, 5 Barn. & Adol. 594. Where the defendant had the plaintiff arrested for

petit larceny, maliciously and without probable cause, in an action for malicious prosecution, the hostility and unfriendly feeling of the defendant prior to the institution of the prosecution may be introduced to enable the jury to determine the *animus* of the defendant in instituting such prosecution. *Bruington v. Wingate*, (Iowa,) 7 N. W. Rep. 478.

TALCOTT v. CHEW and another.

(Circuit Court, S. D. Georgia, E. D. November Term, 1885.)

1. ACCOUNT—ACCOUNT RENDERED—EFFECT OF—OBJECTION.

An account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged as *prima facie* correct.

2. SAME—REASONABLE TIME.

Unless objected to within a reasonable time, and what constitutes such reasonable time is a question of law, an account rendered becomes an account stated, and cannot be impeached, except for fraud or mistake.

3. SAME—ACCOUNT STATED.

A stated account, however, is not conclusive; but when it is admitted in evidence, the burden of showing its incorrectness is thrown on the other party. He may prove fraud, omission, and mistake, and in these respects he is in no wise concluded by the admissions implied from his silence after it was rendered.

4. PRINCIPAL AND AGENT—FACTORS—SALE—ADVANCES—DISCRETION.

While ordinarily factors are bound to obey all orders of their principal, yet when they have made large advances, or incurred expenses on account of consignments, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interest of the consignor; they acting, of course, in good faith, and with reasonable skill.

5. SAME—COMMISSIONS—FORFEITURE—FRAUD—GROSS NEGLIGENCE.

A factor, or other agent who is guilty of fraud, or gross negligence, in the conduct of his principal's business, forfeits all claims to commissions.

6. SAME—COMMISSIONS FROM BOTH PARTIES.

Ordinarily a factor who takes commissions from his principal, who employs him to sell, would violate his contract, should he also take commissions from the person to whom he sells, but when it is clearly understood by all the parties that one who is paid commissions to sell cotton, is also to charge commissions from the buyer the transaction is not illegal. This is especially true where he advances all the money to conduct the business himself, and looks to the sales for his reimbursement.¹

At Law.

Frank H. Miller and Chisolm & Erwin, for plaintiff.

H. Clay Foster and Lester & Ravenel, for defendants.

SPEER, J. Plaintiff brought suit in the superior court of Richmond county, for a balance of \$3,028.44, for losses on cotton shipped to plaintiff on consignment, and on orders given to defendants to purchase cotton for spinners. The defendants, at the appearance term, filed the plea of the general issue; and plaintiff, in vacation, amended his declaration, and declared for money paid out on account stated,

¹See note at end of case.

as "per bill of particulars attached;" and the defendants, by amendment, interposed the plea of set-off for \$7,679.22 cash, had and received by the plaintiff, for their use, and damages incurred by the alleged failure of the plaintiff to sell 640 bales of cotton for future delivery. At the trial term of the cause it was removed to this court. At April term, 1885, the case was referred to an auditor, Charles C. Jones, Jr., with instructions to hear and determine all questions of law and fact arising in the case, and to report his findings. At this November term, 1885, the auditor made his report. After allowing the defendants certain credits, he finds that there is due from the defendants to plaintiff \$2,581.44, with interest from twentieth of September, 1881. To this report both parties except.

The plaintiff excepts because the auditor declined to give judgment for the full amount of the account stated; because of a variance between the plea of set-off and the proof submitted thereunder; and because the credits were allowed.

The material grounds of exception made by defendants are—*First*, that the auditor erred in finding anything, because the account sued on was not an account stated; and that the account was not proven by any competent or sufficient proof; *second*, that the auditor erred in not finding for defendants; that the auditor should have disallowed all commissions, because the plaintiff was an agent employed to sell the cottons of the defendants; that he took several lots of the same on his own account, or sold to himself, and thus forfeited his commissions as a factor; *third*, that the auditor erred in finding that the plaintiff was not obliged, by his contract with the defendants, when instructed so to do, to sell future contracts against the lot of 640 bales of cotton which had been already received on consignment by the plaintiff; *fourth*, and that the auditor also erred in finding that the defendants, by their subsequent dealings, had ratified this refusal to sell for future delivery.

On the hearing it was agreed by counsel that the issues involved should be determined by the court without the intervention of a jury.

I do not regard the exceptions of the plaintiff as material. It is true that the plaintiff's claim must properly be considered, an account stated. On September 20, 1881, the account sued on, being a general account current, was inclosed in a letter from the plaintiff to the defendants with the request that the latter would remit the balance of \$3,028.44. On the twenty-second of September, 1881, the defendants acknowledged the receipt of the statement, and in reply wrote that they were very much pressed with business, but in a few days would look over the statement carefully, and give their views on the matter. On the third of October, 1881, the plaintiff drew a sight draft for the amount of the balance, and on the same day, through his agent, wrote again: "We have nothing from you in regard to your account sales for cotton." On the fourteenth of October the

plaintiff again complained that he had received no statement of errors in the account, and on the 20th the plaintiff telegraphed defendants to send statements of any objections they have to the account. It appears from the evidence that communication by mail could be had between Augusta and New York in two days. See *Wiggins v. Burkham*, 10 Wall. 129.

An account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged as *prima facie* correct. The principle which lies at the foundation of evidence of this kind is that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. The inference is more or less strong, according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it; as that the party was absent from home suffering from illness, or expected shortly to see the other party, and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined. It will not do, however, for a commission merchant to say that his business prevents him from looking over an account contracted in the course of that business; nor is it the custom of merchants who intend to pay an account to say: "We will look over it in a few days, and then give you our views on it." Unless objected to within a reasonable time, (and what constitutes such reasonable time is a question of law,) an account rendered becomes an account stated, and cannot be impeached, except for fraud or mistake. *Oil Co. v. Van Etten*, 107 U. S. 334; S. C. 1 Sup. Ct. Rep. 178; 1 Story, Eq. § 526; *Lockwood v. Thorne*, 11 N. Y. 173; S. C. 18 N. Y. 288-290; *Stenton v. Jerome*, 54 N. Y. 484.

The supreme court of the United States, on this general subject, have held that the failure of a party receiving a letter to reply within a reasonable time after he received it was to raise a presumption that he approved of what had been done, so far as the letter informed him; and, in the absence of anything to rebut that presumption, he was to be regarded as having consented thereto. *Feild v. Farrington*, 10 Wall. 141. The supreme court of Georgia have adopted this ruling, (*McLendon v. Wilson*, 52 Ga. 48,) and reaffirmed it, (*Bray v. Gunn*, 53 Ga. 148.)

A stated account, however, is not conclusive; but when it is admitted in evidence the burden of showing its incorrectness is thrown on the other party. He may prove fraud, omission, and mistake, and in these respects he is in nowise concluded by the admissions implied from his silence after it was rendered. *Wiggins v. Burkham*, 10 Wall. 132; *Perkins v. Hart*, 11 Wheat. 256. It follows, therefore, that the auditor was justified in giving to the account stated the weight of evidence *prima facie*. He was also justified in correcting an error. *Bray v. Gunn*, 53 Ga. 144. I am of the opinion, therefore, that the auditor had the evidence before him to support his finding; nor do I think that his reductions of the plaintiff's demand im-

proper; nor that the defendant can justly complain of the plaintiff's refusal to hold his cotton to warrant him in making sales for future delivery. The plaintiff furnished the money with which to buy the cotton, and while, ordinarily, factors are generally bound to obey all orders of their principal, yet when they have made large advances, or incurred expenses on account of consignments, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interest of the consignor; they acting, of course, in good faith, and with reasonable skill. *Feild v. Farrington*, 10 Wall. 141.

It is true that a factor or other agent who is guilty of fraud or gross negligence in the conduct of his principal's business, forfeits all claims to commissions or other compensation for his services, (*For-dyce v. Peper*, 16 Fed. Rep. 516;) and, ordinarily, a factor who takes commissions from his principal, who employs him to sell, would violate his contract, should he also take commissions from the person to whom he sells, (*Dos Passos*, Brok. 224; *Baston v. Clifford*, 18 Amer. Rep. 549; *Raisin v. Clark*, 20 Amer. Rep. 66; *Lynch v. Fal-lon*, 23 Amer. Rep. 458; *Scribner v. Collar*, 29 Amer. Rep. 541;) nor could an agent employed to sell be himself the purchaser, (Code Ga. § 2186.)

Here, however, the plaintiff was not strictly a factor. It is very clear from the evidence that he was a general commission merchant; that his principal dealings were in dry goods; that he dealt largely with spinning mills and spinners, supplying them with cotton, which he frequently sold to them on time. He was neither a cotton factor, a cotton broker, nor a member of the cotton exchange in New York city; and it was clearly understood by the defendants that because of the peculiar facilities that the plaintiff had to dispose of the cotton to spinners, they would pay him a commission; and they not only understood that he was receiving commissions from the spinners, but they tacitly acquiesced.

The double agency was therefore clearly understood by both parties. The plaintiff furnished the means, not only to pay for the cotton, but frequently to give time to the spinners who bought from him. This was legitimate. *Rice v. Wood*, 18 Amer. Rep. 459; 3 Cent. Law J. 316; *Scribner v. Collar*, 8 Cent. Law J. 205; *Fritz v. Finnerty*, 10 Cent. Law J. 487. In fact, all the cotton purchased was the property of the plaintiff, and the defendants' profits were to be made by the use of his money; and it is not to be supposed that he would sell the cotton for less than its market value.

On the review of the whole case, I am satisfied that there is no error in the report of the auditor. It is therefore approved, and judgment directed for the amount of his finding.

NOTE.

A broker cannot act as the agent of both parties to the transaction so as to be entitled to receive pay for his services from each, unless the parties understood his position, and expressly agreed to such payments. *Robbins v. Sears*, 23 Fed. Rep. 874.

One acting as broker or agent of both parties to an exchange of lands may not recover compensation from either, even upon an express promise, without clearly showing that each had full knowledge of all the circumstances, and assented to the double employment. *Bell v. McConnell*, 37 Ohio St. 396.

OREGONIAN RY. CO., LIMITED, v. OREGON RY. & NAV. CO. (No. 1120.)

SAME v. SAME. (No. 1143.)

SAME v. SAME. (No. 1178.)

SAME v. SAME. (No. 1179.)

(Circuit Court, D. Oregon. April 16, 1886.)

1. PLEADING—SHAM, REDUNDANT, AND IMMATERIAL ALLEGATIONS IN ANSWER.

An allegation in an answer denying knowledge of a matter alleged in the complaint will not be stricken out as sham unless it appears that the same must be false. An allegation in a complaint that the plaintiff, a British corporation, "is a citizen of Great Britain," is meaningless and immaterial, and so is a denial of the same in the answer. It is not necessary that a corporation formed under the law of Great Britain to construct, own, operate, and lease railways in Oregon should specify in its memorandum of association the *termini* thereof; and therefore an allegation in an answer to a complaint, in an action by such a corporation on a lease of its road, that it had not made such a specification, is immaterial. An allegation of fact in an answer which is not *per se* a defense to the action, and is not attempted to be made so by any proper averment, is immaterial. A mere denial of the lessee corporation's power to execute a lease of a railway, in an action thereon by the lessor corporation to recover rent, is a conclusion of law, and immaterial. An allegation by the lessee corporation in such action that the lessor's road had no near connection with its road; that the capital stock of the latter was not contributed to operate leased roads; that the lease was not ratified by its stockholders, or that it was signed by its president and secretary without the state of its origin,—is immaterial. In an action by the lessor to recover the rent reserved in a lease, an allegation in the answer to the complaint that the lessee did not occupy the premises during the period for which the rent is demanded is immaterial, unless it is further alleged that such non-occupation was the direct result of the fault or misconduct of the lessor.

2. ESTOPPEL BY CONTRACT.

In an action by an apparent corporation on a lease of its railway, to recover an installment of the rent reserved therein, the lessee is estopped to deny the lessor's corporate existence or power to make such contract.

3. PLEADING—CONTRADICTORY ALLEGATIONS.

When a denial of knowledge concerning a matter alleged in the complaint is followed by a direct averment necessarily implying such knowledge, either the denial may be stricken out as sham or the averment as redundant.

4. ESTOPPEL—JUDGMENT ON DEMURRER AN ESTOPPEL.

Judgment on a demurrer to a complaint is as conclusive and binding on the parties to the action, as to all matters well pleaded therein, as though it was given on a verdict on an issue arising on a denial of the allegations of the complaint; and if final judgment is given for the plaintiff on a demurrer to an

answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the material matters stated in the complaint.

5. SAME—JUDGMENT—ESTOPPEL OF.

A judgment is an estoppel in an action between the parties thereto as to any fact or matter determined thereby.

6. SAME—ESTOPPEL BY JUDGMENT IN AN ACTION ON LEASE FOR RENT.

A covenant, in a lease of a railway for a number of years, to pay the rent reserved therein in semi-annual installments, is in the nature of a series of undertakings or obligations assumed or incurred at the same time and under the same circumstances, and a judgment in an action to recover any one of these installments of rent is conclusive of the validity of the lease, and the liability of the lessee thereunder, in any subsequent action thereon, as to any matter or defense that might have been made to the first action.

7. SAME—WRIT OF ERROR—EFFECT OF, ON JUDGMENT.

A writ of error from the supreme to the circuit court is not a proceeding under the state Code, but at common law, as modified by the Revised Statutes, and it does not have the effect, pending the proceeding, to suspend the operation of the judgment of the circuit court as a bar or an estoppel.

At Law.

Earl C. Bronaugh, for plaintiff.

Charles B. Bellinger, for defendant.

DEADY, J. These actions are brought by the plaintiff, a corporation alleged to have been formed in Great Britain under the companies act of 1862, against the defendant, a corporation formed under the Oregon corporation act of the same year. They are brought on the covenants in a lease alleged to have been executed on August 1, 1881, by which the former demised to the latter its railway in Oregon for the term of 96 years, upon a rental to be paid in advance, in semi-annual installments, of \$68,131, on May 15th, and November 11th, together with the further sum, at the same times, of \$1,459.95 for the purpose of paying the expense of keeping up the lessor's organization. The first three actions are brought to recover three several installments of rent falling due on November 11, 1884, May 15 and November 11, 1885, and the fourth one to recover the installment of the expense money falling due on November 11, 1885. The first two of the actions were commenced on March 18, 1885, and on November 7th there were amended complaints filed in each of them. The last two were commenced on November 28th, and they were all heard on December 30th and January 2d thereafter, on (1) motions to strike out parts of the answers as "sham, frivolous, irrelevant, immaterial, and redundant;" (2) demurrers to so much of the answers as denies the corporate existence of the plaintiff, and its right to have and exercise the powers and privileges claimed by it; and (3) demurrers to the second and third replies of former adjudications of certain matters between the same parties, in reply to certain defenses set up in the answers.

The answers in these cases are alike, except in the last two there is defense of a former adjudication set up in bar. They are all specimens of what may be called the conglomerate style of pleading, in

which denials and other matters, having no legal or logical connection with one another, are run together so as to form a continuous statement, instead of being pleaded separately as distinct defenses, in the manner required by section 72 of the Code. But the plaintiff, instead of moving to strike out the answers on this account, as it might, (Code, § 81,) has undertaken to purge them of sundry clauses and statements, and has demurred and replied to the remaining portions thereof, distinguishing them by their character.

The motions to strike out include 14 portions or clauses of the answers.

The first one is a denial of the allegation in the complaint that the plaintiff "is a citizen of Great Britain." The complaint alleges that the plaintiff is a foreign corporation, formed under the laws of Great Britain, and adds, "is a citizen of Great Britain." As there are no "citizens" of Great Britain, and as the allegation that the plaintiff is a foreign corporation, formed in and under the laws of Great Britain, is sufficient to show that it is, in contemplation of law, an alien, and therefore entitled to sue in this court, this allegation as to its citizenship is a meaningless and immaterial one, and so is the denial. The only proper response to it was a motion to strike out. Besides, matter in abatement, as that the plaintiff is not a corporation or citizen as alleged in the complaint, must be set up in a separate plea, and if pleaded with any other defense, is deemed waived. Circuit Court Rule 40; *Sheppard v. Graves*, 14 How. 509.

The second clause is an allegation that the plaintiff has not specified in his memorandum or articles of association the *termini* of the road it was incorporated to construct, lease, or operate in Oregon. This allegation is based on the assumption that subdivision 6 of section 4 of the Oregon corporation act, (Or. Laws, 525,) which provides that the articles of a corporation formed thereunder to construct a road shall specify the *termini* thereof, applies to a foreign corporation formed to construct a railway in Oregon. But the validity of the organization of a corporation is to be determined by the law of the place of its formation. In the exercise or assertion of its corporate power in Oregon, a foreign corporation may be required to conform to the law of the state concerning the conduct of corporations, but the sufficiency of its incorporation must be tested by the law of the place of its origin. And this is not all: By the act of October 20, 1880, (Sess. Laws, 56,) "the plaintiff was directly recognized as an existing corporation, lawfully engaged in the construction and operation of a railway in Oregon from 'Portland to the head of the Wallamet valley.'" The effect of this act is to establish the legal right of the plaintiff to construct and own the road in question, and, in my judgment, to dispose of the same. *Oregonian Ry. Co. v. Oregon R. & Nav. Co.* 10 Sawy. 481; S. C. 22 Fed. Rep. 245, and 23 Fed. Rep. 232.

The third clause is a denial of any knowledge whether the plaintiff's memorandum of association specifies the purpose of its incor-

poration as alleged in the complaint. This is moved against particularly as sham. But it does not appear to be false. On the contrary, there is no reason to doubt its truth. The defendant does not appear to have ever had any connection with this memorandum from which it could be inferred that the contents thereof are known to it. *Oregonian Ry. Co. v. Oregon R. & Nav. Co.*, *supra*.

The eighth one is also a denial of knowledge whether the plaintiff's directors ever adopted a resolution authorizing the execution of said lease. It is also moved against as sham. But it does not appear to be false, and must be taken to be true for the same reason.

The fourth one is an allegation as to what the memorandum of association under the companies act of Great Britain is required to contain, without any averment that the plaintiff has not complied therewith in its formation, or any other application of the matter, and is therefore immaterial.

The fifth one is a denial of the defendant's power to lease or operate the plaintiff's road. This is a mere conclusion of law, and should have been alleged, if relied on, by a demurrer to the complaint. *Oregonian Ry. Co. v. Oregon R. & Nav. Co.*, *supra*.

The sixth, seventh, and twelfth ones are allegations to the effect that the plaintiff's road has no near connection with the defendant's; that the capital stock of the latter was not contributed to operate leased roads; and that the lease in question was not ratified by its stockholders. These matters are immaterial and utterly frivolous. *Oregonian Ry. Co. v. Oregon R. & Nav. Co.*, *supra*.

The ninth, tenth, and eleventh ones are clauses and phrases found in an allegation that the lease in question was executed by the president and assistant secretary of the defendant in pursuance of an invalid resolution passed by a minority of the directors without authority of law, to the effect that, while the defendant's principal office is at Portland, its president and assistant secretary signed and sealed said lease at New York. These clauses are omitted from the answers in the last two cases. They are clearly immaterial. It is well settled that while a corporation can have no legal existence beyond the boundaries of the state of its creation, yet it may act anywhere through its agents the same as a natural person, unless prohibited by law. *Bank v. Earle*, 13 Pet. 588; *Runyan v. Coster's Lessee*, 14 Pet. 129; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 476; *McCall v. Byran Manuf'g Co.*, 6 Conn. 436; *Bellows v. Todd*, 39 Iowa, 217; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 25; *Field, Corp.* §§ 25, 254.

The thirteenth and fourteenth ones are statements to the effect that on May 15, 1884, the defendant offered to return the road to the plaintiff, but that the defendant retained possession of the same, under a stipulation with the plaintiff that such possession should not have the effect to prejudice either party, until November 5, 1884, when, in a suit brought in this court by the plaintiff, the defendant was enjoined, and required to operate the road until the further order

of the court, which it did until the appointment of a receiver in said suit on the motion of the plaintiff, who thereupon took possession of the property, and held it during the period for which the rent is sought to be recovered in this action. This is not an action to recover money for the use and occupation of the premises. It is brought on the covenant of the defendant contained in the lease to pay the specific amount therein reserved as rent. Therefore these allegations concerning the possession of the property are immaterial. They do not affect the obligation of the defendant to pay the rent according to its contract, unless it is further alleged that such non-occupation was the direct result of the fraud or misconduct of the lessor. *Oregonian Ry. Co. v. Oregon R. & Nav. Co., supra.* And so far as the possession of the receiver is concerned, it is for the benefit of whom it may concern, and, so far as appears, that is defendant.

All the clauses in the answer moved against except the third and eighth ones are immaterial. The matter contained in these comes within the purview of the demurrers to the answers.

The demurrers are taken to all those portions of the answers that controvert or deny the corporate existence and due organization of the plaintiff, or the powers, franchises, or ownership of the plaintiff, alleged in the complaints, for the reason "the defendant ought not to be allowed or heard to say that the plaintiff is not a corporation, or has no power to make the contract herein sued on, or to make any denials contrary to defendant's own acknowledgment and deed of August 1, 1881, as appears by the complaint herein, and admitted by the answer thereto."

These demurrers are well taken. *Oregonian Ry. Co. v. Oregon R. & Nav. Co. supra.* This question was well considered in that case, and I have nothing to add to the conclusion reached therein. As was then said:

"Where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard, in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract."

On November 27, 1885, the plaintiff replied to so much of said answers as are not included in the demurrers thereto and the motion to strike out. After denying any knowledge of the invalidity of the meeting of the defendant's directors at which the execution of the lease was authorized, the replies, briefly stated, allege: (1) A ratification of the lease by the defendant with knowledge of all the facts, by entering upon and taking possession of the road thereunder, about August 1, 1881, and continuing in the same, and paying rent therefor, until May 15, 1884, wherefore the defendant ought not to be allowed or heard to deny the execution of said lease, or the binding obligation thereof; (2) that the defendant ought not to be allowed or heard to deny the execution by it of said lease, because on June 28,

1884, the plaintiff commenced an action against the defendant thereon, in this court, for the installment of rent falling due thereon on May 15, 1884, wherein, among other things, the due incorporation of the plaintiff, and its power and authority to construct and lease said road, as well as the due execution and validity of said lease, and the power and the authority of the plaintiff and defendant to execute the same, and perform the covenants therein contained, were put in issue and contested by a demurrer to the answer of the defendant therein, and by the judgment of this court thereon were determined in favor of the plaintiff, whereupon, on March 28, 1885, the defendant not making, or offering to make, any further answer or defense to the complaint, final judgment was given thereon for the plaintiff and against the defendant for the sum demanded thereon; (3) that the defendant ought not to be allowed or heard to deny the corporate existence of the plaintiff, or to deny the demise by the plaintiff to the defendant, or the due execution by each of them of said lease as alleged in the complaint, because on June 25, 1885, the plaintiff commenced another action thereon, in this court, against the defendant, to recover three semi-annual installments of the yearly sum of \$2,919.90, which the defendant in and by said lease agreed to pay the plaintiff, to meet the expense of maintaining its organization, pending said lease, amounting in the aggregate to \$4,379.85, wherein on July 29, 1885, on a demurrer to the complaint by the defendant, judgment was given against it for the amount claimed by the plaintiff; and (4) in the last two actions denies that on July 29, 1885, or other time, in any action then pending between the plaintiff and defendant for the same cause of action set forth herein, any judgment was given in favor of the former or against the latter for the sum of \$4,028.32, or any other sum.

On November 28th the defendant moved to strike out the reply of ratification, and the two replies of prior adjudication, and also an averment following the denial therein of any knowledge of the alleged invalidity of the meeting of the defendant's directors at which the lease was authorized, to the effect that said meeting was duly called and held, and the resolution in question duly passed thereat. The effect of these two contradictory allegations as to this matter of the meeting in question is to make the denial a sham, or the averment redundant, as the party moving against them may elect. The motions to strike out were allowed as to the averment on the ground of redundancy, and denied as to the replies, for the reason that their sufficiency ought to be tested by demurrer. Thereupon, on January 2, 1886, the defendant demurred to the two replies of former adjudication, and the questions arising thereon were then argued by counsel and submitted. From these replies it appears that certain matters set up in the answers herein as a defense to these actions have been heretofore considered and determined in this court, in an action between these parties, on this lease, in favor of the plaintiff.

On a demurrer to a complaint every material matter well pleaded therein is confessed, and if judgment is given thereon, the same is as conclusive and binding on the parties to the action as though it was given on an issue arising on a denial of the allegations of the complaint; and if a final judgment is given for the plaintiff, on a demurrer to the answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the truth of the material allegations in the complaint, and may be pleaded as an estoppel in any other action between them. *Gould v. Evansville, etc., R. Co.*, 91 U. S. 533; *Aurora v. West*, 7 Wall. 99; *Goodrich v. City*, 5 Wall. 573; Wells, Res. Adj. § 446.

In the first action mentioned in the reply it appears that the defendant answered the complaint, and alleged the invalidity of the lease for the reason, among others, that it had no power to execute the same; and on a demurrer to this answer final judgment was given for the plaintiff. In the second one, all the material facts relative to the incorporation of the plaintiff, and the execution of the lease by the plaintiff and the defendant, were admitted by a demurrer to the complaint, on which there was a final judgment in favor of the former.

A judgment in an action on a particular demand is an estoppel in an action between the same parties as to any fact or matter actually put in issue and determined or admitted in the prior action. *Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac*, Id. 353; *Russell v. Place*, Id. 608; *Beloit v. Morgan*, 7 Wall. 619; *Sharon v. Hill*, 26 Fed. Rep. 337.

Beloit v. Morgan, *supra*, is a good illustration of the rule, and a case on all fours with this. A judgment was given in an action on a bond against the maker thereof in favor of the plaintiff. The bond was one of a series issued at the same time; and in a subsequent action between the same parties, on another of these bonds, it was held that the judgment in the first action was conclusive, as to the validity of all of them. The court said, in substance, that all the objections made to the enforcement of the bonds in the second action might have been made in the first, and that "a party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

In this lease there are, so to speak, a successive series of obligations or undertakings by the defendant to pay rent to the plaintiff every half year for a number of years, incurred or assumed at the same time and under the same circumstances. In the action brought to recover an earlier installment of this rent the defendant might have made any defense thereto involving the validity of the lease or its liability thereunder, and the question of the validity of the lease, and the liability of the defendant to pay the rent therein reserved, having been determined in favor of the plaintiff in that action, the

controversy is so far closed, and the defendant is estopped to set up any defense to a subsequent action for the recovery of any other of such installments of rent that existed and might have been made to the former action. On the argument it was suggested that the judgment in the first of the former actions had been taken to the supreme court on a writ of error, and therefore its operation, as a bar or an estoppel, is suspended. It is admitted that the writ of error has been taken as suggested; but even then it is not clear that the court can take notice of the fact on the demurrer to the replication. On the trial of the question made by the reply, the record of the former suit being introduced in support of the allegation therein, the fact that the judgment had been taken to the supreme court on error may be shown by way of confession and avoidance of the reply, if the effect of such a proceeding is to suspend the force and operation of the judgment, as claimed.

But considering, for the time being, that the admission of the plaintiff's counsel as to the writ of error is a part of the reply, the estoppel of the former judgment is not affected thereby. A writ of error does not suspend the operation of a judgment as a bar or an estoppel. It is not an appeal, which is so far a continuation of the original suit, but a proceeding in the nature of a new action to annul and set aside the judgment of the court below, which is not thereby vacated or affected pending the proceeding. *Railway Co. v. Twombly*, 100 U. S. 81; *Sharon v. Hill*, 26 Fed. Rep. 337; *Freem. Judgm.* § 328. A writ of error from the supreme court to this is not a proceeding under the Code, but the common law, as modified by the Revised Statutes. The declaration of the latter clause of section 505 of the Code that an action "is deemed pending from the commencement thereof until its final determination upon appeal," has no application to an action in this court,—at least after it has terminated in a judgment for either party. The proceeding for the review of such a judgment is had in the supreme court, and is not within the operation of section 914 of the Revised Statutes, conforming the practice in the circuit and district courts to that of the state courts. But it is also admitted that no writ of error has been taken to the judgment in the second action mentioned in the reply, and there is therefore no question that it is an estoppel as to all the material matters admitted by the demurrer to the complaint therein.

The motions to strike out portions of the answers are allowed, except as to the clauses numbered 3 and 8, and as to these they are disallowed. The demurrers to the answers, including the matter in said clauses 3 and 8, are allowed, and the demurrers to the replies are overruled.

This leaves the cases for trial on the questions of fact arising on the replies of ratification and prior adjudication to the answers of the defendant, the former being, by section 92 of the Code, "deemed controverted by the adverse party, as upon a direct denial of avoid-

ance, as the case may require," without any actual rejoinder thereto; and the issues made between the replies in numbers 1,120 and 1,143, to the defenses of former judgments in actions on the same cause of action.

HOSFORD v. HOTCHKISS.¹

(*Circuit Court, E. D. New York. April 12, 1886.*)

HUSBAND AND WIFE—SEPARATE ESTATE—PROMISSORY NOTE—INDORSEMENT BY WIFE OF MAKER—LIABILITY.

Where a promissory note was made by one H., payable to the order of his wife, who thereafter, before the delivery of the note, signed the following indorsement: "Pay to the order of P. For value received, I hereby charge my separate estate with payment of within note;" and there was no protest or notice of non-payment of the note: *held*, in an action seeking to charge the wife as joint maker, that her liability was simply that of an indorser.

At Law. Demurrer to complaint.

John McDonald, for plaintiff, Louisa P. Hosford.

John E. Parsons, for defendants.

BENEDICT, J. On the fifteenth day of May, 1879, one Philo P. Hotchkiss made his promissory note as follows:

"NEW YORK, May 15, 1879.

"Three years after date I promise to pay, to the order of Georgiana I. Hotchkiss, five thousand dollars, at the American Exchange Bank, value received, with interest at the rate of seven per cent., payable semi-annually. Due May 18, 1882.

"PHILO P. HOTCHKISS."

Georgiana I. Hotchkiss was at the time of the making and delivery of the note, and now is, the wife of the maker, and was then and is now possessed, in her own right, of a separate estate. She, before the delivery of the note, wrote upon the back as follows:

"Pay to the order of Mrs. Louisa P. Peet. For value received, I hereby charge my separate estate with payment of the within note.

"GEORGIANA I. HOTCHKISS."

Upon these facts, the question raised by the demurrer to the complaint is whether, there having been no protest or notice of non-payment of the note, Georgiana I. Hotchkiss can be held liable to pay it as joint maker thereof with her husband. Upon this question my opinion is that the defendant cannot be held liable upon this note in question as joint maker.

Her writing on the back of the note contains no promise to pay. What she did was to write an indorsement on it by the words, "Pay to the order of Mrs. Louisa P. Peet." She then wrote: "For value received, I hereby charge my separate estate with the payment of the

¹ Reported by R. D. & Wyllys Benedict., Esqs., of the New York bar.

within note;" but she wrote no express promise to pay. A promise to pay is doubtless to be inferred; but whether the promise to be inferred is the promise of an indorser or the promise of a maker is the question to be decided. My opinion is that the promise of an indorser is the promise to be inferred, and for this reason: The note itself shows that the primary relation of the defendant to the note was that of an indorser. She was the payee of the note; an indorsement by her was therefore contemplated. She wrote an indorsement on the note. If her action had been confined to writing this bare indorsement, and signing her name, the indorsement would have created no liability whatever on her part, because of the fact that she was a married woman. Being a married woman, her bare indorsement would be equivalent to an indorsement without recourse. What she added to the bare indorsement had the effect to deprive her of the personal immunity from liability that would follow if nothing was added to the bare indorsement, and I find nothing in what she added indicating an intention to do more. In what she added she assumed a liability, but she did not state whether the liability was the liability of a maker, or the liability of an indorser, of the note. Her intention in that respect is disclosed by the relation she then bore to the note, which was that of indorser. If she had intended to change her relation to the note from that of indorser to that of maker, something more would have been said. The indorsement she had written would have created a liability to pay in case of non-payment by the maker, and due notice to her, but for the fact that she was a married woman; and this was the liability intended to be assumed by her as a married woman when she added what she did. From this a promise to pay must be inferred, but the promise must be co-extensive with the liability assumed, and that was the liability of an indorser, and not the liability of a maker.

There must be judgment for the defendant on the demurrer.

BARTELLS and others v. REDFIELD.

(*Circuit Court, S. D. New York.* April 17, 1886.)

CUSTOMS DUTIES—ACTION FOR ILLEGAL DUTIES—INTEREST—LACHES.

An importer who has brought suit to recover duties wrongfully exacted from him by a collector, cannot recover interest by way of damages, if he has been guilty of laches in unreasonably delaying the prosecution of the suit after it has been brought.

On Exceptions to Report of Referee.

A. W. Griswold, for plaintiffs.

Mr. Greenwood, for defendant.

WALLACE, J. This case comes here upon exceptions filed by the defendant to the report of a referee to whom it was referred to ascertain what sums are due the plaintiffs for excess of duties illegally exacted by the defendant as collector of the port of New York upon the importation by plaintiffs of certain merchandise. The suit was brought in November, 1863. April 21, 1864, a verdict was entered for the plaintiffs upon a trial before a court and jury, which, as has been considered when this case was here on a former occasion, was in effect a stipulation between the parties that the plaintiffs were entitled to recover judgment for excess of duty on account of certain specified exactions, but the amount was undetermined. See 16 Fed. Rep. 336. April 21, 1864, an order was entered in the case referring it to the clerk of the court, or his deputy, to ascertain and adjust the amount to which the plaintiffs were entitled under the verdict. Subsequently an order was made by the court vacating the order of reference to the clerk, and referring the case, with a large number of similar cases, to the collector of the port for adjustment. Subsequently that order was vacated, and the present reference was ordered.

The exceptions raise the question whether the plaintiffs are entitled to recover interest upon the sums illegally exacted by the defendant. The case of *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, S. C. 3 Sup. Ct. Rep. 570, is an authority for the proposition that a plaintiff who has brought a suit to recover money wrongfully exacted from him by the defendant cannot recover any interest by way of damages, if he has been guilty of laches in unreasonably delaying the prosecution of the suit after he had brought it. The cases of *Bann v. Dalzell*, 3 Car. & P. 376; *Newel v. Keith*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49,—are referred to in the opinion of the court as deciding that where interest is recoverable, not as part of the contract, but by way of damages, it may be properly withheld if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim. *Bann v. Dalzell* was an action at *nisi prius* of debt, on an Irish judgment, in which the original debt would not have carried interest; and the judge left it to the jury to determine whether the plaintiff had taken proper steps to find the defendant, instructing them that if he had they might give him a verdict, with such interest as they should deem reasonable. *Newel v. Keith* was an action for personal services; and the court held that where no time is agreed upon for the payment of personal services, and no charge in fact made for them, nor presentment for payment in the life-time of the party, and the claim was permitted to sleep a great length of time from the voluntary act of the plaintiff, no interest should be allowed on such claim except from the death of the party. *Adams Exp. Co. v. Milton* was an action on an unliquidated account for a balance claimed to be due for work and labor; and the court held that interest was not allowable under the rules of pleading, because there was no special

count for interest. None of these cases throw any light upon the question here, as in none of them was the point considered respecting the effect of laches subsequent to the bringing of the suit.

The rule adopted in the *Redfield Case* by the supreme court has introduced into the present case an issue which is quite foreign to those made up by the pleadings, and relates to transactions, covering a period of 20 years, which have taken place since the bringing of the suit. Had the case been tried as these cases generally are,—with a jury,—it is quite safe to say that neither of the parties could have been prepared to enter upon such an extended field of inquiry as that to which the voluminous evidence before the referee has been directed.

The delay which has intervened since the consent verdict in the case was entered, a period of over 20 years, is extraordinary. If the defendant, or rather the government, which is the real party in interest, has not been mainly responsible for this delay, there would seem to be no just cause on its part to complain of it; because, by the rules of practice, the defendant could have brought the trial of the case to a conclusion at any time as well as could the plaintiffs, or the government might have asserted its unwillingness to acquiesce in further delay by a motion for judgment as in case of nonsuit. But the referee finds that the delay was not fairly attributable to the plaintiffs, but arose mainly from complications incident to the fact that the suit was one of a very large number of similar suits in which questions affecting the defendant's liability were being litigated from time to time, with varying results; that any recovery which defendant might have obtained would not have been acquiesced in by the government, but would have been further litigated; and that his claim was to that extent involved with the trials and results of the other suits that it was reasonable to postpone the trial in prospect of an adjustment, which at times seemed to be near at hand, but was constantly deferred by the vacillating action of the officers of the government.

The conclusion of the referee seems to be sustained by the evidence. The exceptions are therefore overruled.

BIRDSEYE and others v. HEILNER and others.

(Circuit Court, S. D. New York. December 22, 1885.)

PATENTS FOR INVENTION—INFRINGEMENT—PLEADING.

By taking issue upon a plea, complainant admits its sufficiency in point of form and substance; and if the facts alleged are established, defendant will be entitled to judgment.

In Equity.

Edmund Wetmore, for complainants.

Livingston Gifford, for defendants.

WALLACE, J. By taking issue upon the plea the complainants admit its sufficiency in point of form and substance. The only facts which are put in issue by the replication are whether the springs or stays which the defendants have employed in making corsets were purchased by them from one Bassett, and whether Bassett was licensed by complainants to manufacture and sell said stays or springs for use in the manufacture of corsets. If these allegations of fact are established, the legal conclusion that they are a good defense to the suit is not open to contention. The case has been argued as though the question were whether the complainants have authorized Bassett to license others to use the complainants' patents for improvements in corsets. No such issue is raised by the plea and replication. The proofs show that the defendant purchased the springs or stays used by them in manufacturing corsets, and which are known in the trade as "twin-wire," from Blun & Co. and one Doremus, who had purchased them from Bassett, and who were his agents to sell the same to others. The only question, therefore, is whether Bassett was authorized by the complainants to sell the articles for use in the manufacture of corsets. The complainants and Bassett entered into an agreement, bearing date March 30, 1881, by which Bassett covenanted to manufacture for the complainants all corset materials which they might require, upon specified conditions, including bone-wire, twin-wire, and other corset materials, and the complainants covenanted to discontinue the manufacture of such materials. The agreement contained these provisions:

"It is agreed that the parties of the second part [the complainants] shall not sell bone or twin wire to any other corset manufacturer, except when it is intended to be used in corsets intended for the sales of the parties of the second part. It is agreed that the party of the first part [Bassett] shall not sell twin-wire to any party or parties for a less price than twenty per cent. in addition to the price which he shall charge the parties of the second part, and he shall pay to the parties of the second part five per cent. on all sales of twin-wire which he may make to any party or parties other than the parties of the second part."

It appears very clearly by the proofs that the complainants had been making, for several months, the article of twin-wire for use in corsets

of a description invented by one Bray. It is the precise article, also, that has been purchased by the defendants of Bassett, through Blun & Co. and Doremus. As early as in the fall of 1880 the complainants had entered into an arrangement with Bray for the purchase of his invention, which had not then been patented, and Bray had agreed to assign his patent to them when it should be obtained. Owing to delay on the part of Bray the application for a patent was not filed until April 23, 1881. In the mean time the complainants had been making twin-wire to use in manufacturing the Bray corsets, and had been manufacturing these corsets and selling them to a limited extent. The time came when the complainants wanted to forego the manufacturing of corset material, and confine themselves to manufacturing corsets from materials to be supplied by others; hence the negotiations with Bassett which resulted in the execution of the agreement. Bassett was aware of the relations existing between the complainants and Bray, and that the complainants had purchased Bray's invention, and expected to obtain the patent, and these matters had been the subject of conversation between Bassett and complainants during the negotiations which resulted in the execution of the agreement. It also appears that although at some period previous to the date of the agreement twin-wire had been used to a limited extent for other purposes than for the manufacture of the Bray corsets, its use for those purposes had become obsolete, and had been abandoned. In view of these facts, it is manifest that both parties to the agreement understood that the twin-wire which Bassett was to make and sell to the complainants and to other persons was just such an article as he has sold to the defendants. It is also manifest that the parties contemplated that the sales which Bassett was expected to make would be made to manufacturers for use in making corsets. This was the only use of which the article was practically capable, and unless it was to be sold for such use it could not probably be sold at all.

If the question was whether, by this agreement, the complainants have authorized Bassett to license others to use their patents in manufacturing corsets, the answer would not seem to be difficult. The scope of the agreement does not extend beyond the relations which the parties to it are to assume towards each other in the manufacture and sale of corset material. There is nothing in its language, or in the circumstances contemporaneous with its execution, to justify the implication that Bassett was to have any interest, by way of license or otherwise, in either of the two patents upon which the bill is founded. The contemporaneous facts, and the terms of the agreement, are consistent with the purpose of the parties to secure to the complainants a royalty upon twin-wire in the event a demand for it should arise among manufacturers to be licensed by the complainants to use their Bray patent, who might find it more convenient or economical to purchase the material of Bassett than to make it themselves. This

conclusion is enforced by the fact that the complainants did not then have any interest in the other of the two patents in suit,—the patent granted to Cohn in February, 1880, and which was purchased by the complainants in October, 1884; but, as has been stated, this question is not here.

The defendants have established the truth of the facts alleged in their plea, and they are therefore entitled to judgment.

CELLULOID MANUF'G Co. v. ZYLONITE BRUSH & COMB Co. and others.¹

(Circuit Court, S. D. New York, 1886.)

1. PATENTS FOR INVENTIONS—SECOND REISSUE TO REINSTATE ORIGINAL CLAIMS.

The question whether a reissue is valid which is granted merely to reinstate a patentee to an invention he had surrendered in order to obtain a wider monopoly than that covered by the original, decided in the affirmative; following the ruling in *Giant Powder Co. v. Safety Nitro-Powder Co.*, 19 Fed. Rep. 509, where the facts were strictly similar to those in this case.

2. SAME.

The fact that a second or subsequent reissue is taken in order to reinstate the specification and claims of the original precludes the assumption that the original was invalid or inoperative.

3. SAME.

By accepting a reissue containing the same claims as the original, the patentee declares, in a formal and deliberate manner, that as to the invention which he now claims the original patent was not inoperative or invalid.

4. FIRST REISSUE VOID IF IDENTICAL WITH ORIGINAL.

It would not seem doubtful that if the first reissue had been identical with the original in the specification and claim it would have been void.

5. SAME.

In such a case the original patent would have been abandoned, and the reissue would have been a nugatory grant, because the statutory conditions did not exist which are precedent to the exercise of the power of granting reissues.

6. SAME—REISSUE WITH ORIGINAL AND ADDITIONAL CLAIMS.

Whether a reissue which reinstates the original claims, and inserts additional claims, not contained in the original, is valid even as to the original claims, and the effect of delay in applying for such a reissue, are difficult questions, decided in this case on the rule of comity.

7. COMITY, RULE OF.

Whatever conclusion might have been reached by this court if the questions presented had not been considered and determined by another court of co-ordinate jurisdiction, *held*, the decision of the latter court was entitled to great respect, and should be followed.

8. SAME.

It would be unseemly that one rule of property in patents should prevail in one part of the country, and another in other parts, where the same title may be brought into litigation. In such cases the question should be remitted for final decision to the court of last resort.

This was a bill for infringement of reissued letters patent to John W. Hyatt, Jr., and Isaiah S. Hyatt, assignors, for improvement in treating and moulding pyroxyline. The reissue sued on was the third

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

of the original, which was granted July 12, 1870. The first reissue was granted June 23, 1874, the second April 15, 1884, and the third, the one in suit, December 23, 1884. None of the claims of the original patent were retained in the first reissue; the second reissue contained only one claim of the original; and the two claims of the third reissue, and the specification, so far as it related to these two claims, were the same as the original. These several reissues were set up by plea, and the plea being set down for argument, the questions, were, whether a reissue is valid which is granted merely to reinstate a patentee to an invention which he has surrendered in order to obtain a wider monopoly than he had obtained, and, if such a reissue is valid under any circumstances, whether it is so after such a delay as had taken place in this case.

Rowland Cox, for complainant.

H. M. Ruggles and *Thos. W. Osborn*, for defendants.

WALLACE, J. The defendant has interposed a plea to the bill of complaint, and the plea has been set down for argument. The suit is brought upon reissued letters patent granted December 23, 1884, to John W. Hyatt, Jr., and Isaiah S. Hyatt, assignors, for improvement in treating and moulding pyroxyline. It appears by the plea that the original patent was granted July 12, 1870; that an application was made for a reissue May 26, 1874, and a reissue was granted June 23, 1874; that an application was made for a second reissue March 10, 1884, which reissue was granted April 15, 1884; and that an application was made for a third reissue November 26, 1884, and a reissue was granted December 23, 1884. The plea sets forth the original patent and the several reissues in full. The original patent contained three claims; the first reissue contained five claims; the second reissue contained three claims; and the last reissue contains two claims.

The general nature of the invention was described in the specification of the original patent as follows:

"Our invention consists—*First*, of so preparing pyroxyline that pigments and other substances in a powdered condition can be easily and thoroughly mixed therewith before the pyroxyline is subjected to the action of a solvent; *secondly*, of mixing with the pyroxyline so prepared any desirable pigment, coloring matter, or other material, and also any substance in a powdered state which may be vaporized or liquified, and converted into a solvent of pyroxyline by the application of heat; and, *thirdly*, of subjecting the compound so made to heavy pressure while heated, so that the least practicable proportion of solvent may be used in the production of solid collodion and its compounds."

This description indicates sufficiently for present purposes what the invention was essentially. In the specification of the first reissue much additional explanatory matter was inserted for the purpose, obviously, of laying a foundation for more expanded claims than those of the original patent. In the specification of the second reissue this additional explanatory matter was mainly omitted, so that the specification read like that of the original patent, with some trifling and

immaterial changes. The specification of the third reissue is practically identical with that of the original patent, except that it disclaims the invention which was the subject of the first claim in the original.

The claims of the original patent were as follows:

"Grinding pyroxyline into a pulp, as and for the purposes described. (2) The use of finely communicated camphor gum, mixed with pyroxyline pulp, and rendered a solvent thereof by the application of heat, substantially as described. (3) In conjunction with such use of camphor gum, the employment of pressure, and continuing the same until the mould and contents are cooled, substantially as described."

The claims of the first reissue were as follows:

"(1) The combination of pyroxyline with camphor gum, or any equivalent converting agent, in such manner that the transforming action of the converting agent is kept latent, substantially as and for the purpose set forth. (2) The method, substantially as herein described, of developing the latent power of the converting agent by the application of heat to a mixture of pyroxyline and gum camphor, or its equivalent, for the purposes set forth. (3) The method, substantially as herein described, of making solid collodion, by subjecting a mixture of pyroxyline and a latent solvent to heat and pressure. (4) The method, substantially as herein described, of converting pyroxyline into solid collodion, by the use of solid solvents. (5) The new material herein described, consisting of pyroxyline and gum camphor, or its equivalent, with or without the addition of other substances to increase its body or change its color, the same being capable of being softened by heat and remodeled or formed, as described."

The claims of the second reissue were as follows:

"(1) The process of preparing pyroxyline, consisting of grinding the pyroxyline into a pulp, and, after mingling therewith a solvent, subjecting the mixture to heat and pressure, substantially as and for the purpose described. (2) The use of finely comminuted camphor gum mixed with pyroxyline pulp, and rendered a solvent thereof by the application of heat, substantially as described. (3) The treatment of pyroxyline pulp containing camphor mixed therewith, in a finely-divided condition, by subjecting the same to pressure in moulds, and continuing the pressure until the mould and its contents are cooled, substantially as described."

The claims of the reissue in suit are in identical language the second and third claims of the original patent.

The plea raises the questions whether a reissue is valid which is granted merely to reinstate a patentee to an invention or inventions which he has surrendered in order to obtain a wider monopoly than he had obtained; and if such a reissue is valid under any circumstances, whether it is so after such a delay as has taken place here.

It will be observed that none of the claims of the original patent were retained in the first reissue; that nearly 10 years expired before that reissue was surrendered, and the application was made for the second reissue; that in the second reissue only one claim was the claim of the original patent, that being the second claim, and identically the second claim of the original; and that in the third (the present) reissue the two claims, and the specification so far as it relates to these claims, are the same as the original patent. Thus it ap-

pears that, after waiting four years, the original patent was surrendered upon the assertion of the patentee that it did not properly describe or claim his real invention, and that the omission arose from inadvertence, accident, or mistake, and that his real invention was in fact a broader one than he originally supposed. Then, for 10 years subsequently, the patentee rested upon the assumption that the original mistake had been rectified, and that he was justly entitled to the broader monopoly of the first reissue. Finally, and now, he asserts that although for 10 years he had supposed that the original error had been corrected, and his invention been properly described and claimed in the first reissue, nevertheless he now finds that the reissue was invalid because the claims were broader than he was lawfully entitled to hold against the public; that the error arose from inadvertence, accident, or mistake; and that, in fact, the invention which he is lawfully entitled to hold had been properly described and claimed in his original patent 14 years before. The patentee may have supposed when he surrendered his original patent that it did not contain as broad claims, or claims for as many different inventions, as he was entitled to; he may have supposed when he surrendered the first reissue that it was invalid because the claims were too broad, and he probably surrendered it for this reason; he may have supposed when he surrendered the second reissue that it contained one claim which was void for want of novelty; but, as a matter of fact, the original patent described and claimed both of the inventions which are now secured to him in all their parts by a correct specification, and by claims which were unambiguous and apt.

The facts disclosed upon the record preclude the assumption that the original patent was invalid or inoperative to secure to the patentee his present claims by reason of a defective or insufficient specification, or by reason of his claiming as his own invention more than he had a right to claim as new; or that there was any error in the specifications or claims, so far as they relate to his present rights, which arose from inadvertence, accident, or mistake. Such an assumption cannot be indulged, but is overthrown by a comparison of the several patents. Each claim of a patent covers a complete invention, and is, in substance, an independent patent; and as respects the two inventions covered by the claims of the present reissue the specification and claims are identical with those of the original. The original was therefore as operative and valid in all respects as is the last reissue, and, by accepting the present reissue, he has declared, in a deliberate and formal manner, that as respects both of the inventions which he now claims the original patent was not inoperative or invalid.

It would not seem doubtful that if the first reissue had been identical with the original in the specification and claims, that it would have been invalid. The original patent would have been abandoned, (*Peck v. Collins*, 103 U. S. 660; Rev. St. § 4916,) and the reissue would

have been a nugatory grant because the statutory conditions did not exist which are precedent to the exercise of the power of granting reissues.

But it may be urged with force that the original patent was inoperative or invalid to secure to the patentee all that he had really invented, and had described or substantially indicated in the specification of the original, so that he was entitled to a new one, with broader claims, or would have been if he had not delayed in his application unduly; and this being so, that the reissue was not void as an unauthorized exercise of the statutory power, but only invalid to the extent of the new and broader claims; and that it was competent for the commissioner to correct the error of law by a new reissue which would reinstate the patentee in what rightfully belonged to him before. Whether this contention is correct, and, if so, whether the error can be corrected after the expiration of so long a period as intervened in this case, are questions of much difficulty.

The facts presented by the record are so strictly similar to those in *Giant Powder Co. v. Safety Nitro-Powder Co.*, 19 Fed. Rep. 509, that the decision there is directly and completely in point here against the sufficiency of the plea. Whatever conclusion might have been reached if the question now raised had not been considered and determined by another court of co-ordinate jurisdiction with this, that decision is entitled to great respect, and should be followed now. It would be unseemly that one rule of property in patents should prevail here, and another in other parts of the country, where the same title may be brought into litigation. The question should be remitted for final decision to the court of last resort.

The plea is overruled.

SCHULTZ v. OSTRANDER.¹

(Circuit Court, E. D. Missouri. April 20, 1886.)

PATENTS FOR INVENTIONS—REISSUE—ENLARGING CLAIM—STEAM-PUMPS.

The first, second, third, and sixth claims of reissued letters patent No. 9,818, granted to M. Schultz for an improvement in steam-pumps, *held*, unlawful expansions of the original patent, and therefore void.

In Equity. Suit for the infringement of reissued letters patent No. 9,818, granted to M. Schultz for an improvement in steam-pumps.

L. M. Hosea, for complainant.

Charles A. Hawley, for defendant.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

TREAT, J. Under the admissions of counsel that the defendant does not infringe the fourth and fifth claims of the reissued patent sued on, (No. 9,818,) the court is brought sharply to a determination of the question as to whether the other claims in the said reissued patent are expansions of the original patent, and void in law. The struggle seems to be to cover, under reissue, the frame-work employed on the pump, of which there was nothing suggested in the original patent. Hence the court holds that the first, second, third, and sixth claims of said reissued patent are unlawful expansions of the original patent, and therefore void.

Bill dismissed, with costs.

CALKINS and others v. OSHKOSH CARRIAGE Co. and others.¹

(Circuit Court, E. D. Wisconsin. April, 1886.)

1. PATENTS FOR INVENTIONS—WANT OF NOVELTY.

Letters patent No. 261,829, of August 1, 1882, to Alton J. Calkins, for an improvement in carriage bodies, are void for want of novelty.

2. SAME.

The patent was for a carriage body having rounded corner posts, with grooves to receive the side and end panels, and tenons to receive side and end rails, and corner irons to hold the rails rigidly to the posts, the whole forming a carriage body ingeniously adjusted and held together without the aid of screws; but all the elements of the claim were old, and in view of the prior state of the art, *held*, that it did not require invention to bring them together.

3. SAME—MECHANICAL SKILL.

Although the adjustment of the different parts of patentee's combination was novel, and the combination, as an entirety, useful, *held*, that it exhibited only the expected skill of the mechanic's calling, and not the creative work of the inventor.

In Equity.

Erwin & Benedict, for complainants.

Cotzhausen, Sylvester, Scheiber & Sloan, for defendants.

DYER, J. This is a suit to restrain the infringement of letters patent No. 261, 829, issued to the complainant Calkins August 1, 1882, upon an application filed May 18, 1882, for an improvement in carriage bodies, and to recover profits and damages. In the specifications of the patent the patentee describes his invention as follows:

"My invention relates to improvements in carriage bodies, and pertains to the peculiar construction of the corner posts, the side frames, and the manner of attaching the panels to the frames and corner pieces. My invention is further explained by reference to the accompanying drawings. * * * A is the corner post; B represents one of the standards, which are inserted at short intervals between the respective corners; C is the upper rail; D is the

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

lower rail; E are the panels. The corner posts, A, are provided with grooves, F, F, upon their respective edges for the reception of the ends of the panels, E, and recesses, G, G, for the reception of the ends of the rails, C, C. The rails, C, C, and the upper ends of the corner posts, A, are provided with a narrow flange or elevation, H, which projects above the body of the rail, and serves to retain the seat upon the edge of the box. The thickness of the posts, A, is such that they form a neat ornamental finish to the cover from the outside, while they are flush with the inner surface of the upper rails upon the inside. The ends of the posts, B, are tenoned into the lower and upper rails in the ordinary manner. Both the upper and lower rails, C and D, are provided with grooves, I, I, for the reception of the respective upper and lower edges of the panels, whereby the panels are retained without screws at both their sides and ends as shown. The upper and lower rails are connected together by the standards, B, thus securing a rigid substantial frame for the body. It is obvious that by thus securing the edges of the panels in grooves, much stronger and more durable joints are formed than heretofore, and the tendency to become separated by action of the atmosphere is thus avoided. J, J, are corner irons, by which the corner posts and the top and bottoms rails are rigidly retained in contact. The corner posts may be made of cast-iron instead of wood, if desired."

The patent contains a single claim, which is for "the corner posts, A, provided with recesses, G, G, and grooves, F, F, in combination with rails, C and D, panels, E, and irons, J, J, substantially as and for the purpose specified."

The patentee perfected his alleged invention some time in September, 1881. Various questions arise upon the issues made by the pleadings. The defendants deny infringement. They also deny that Calkins was the original inventor of the alleged improvement, and allege that his patent was anticipated by other earlier patents; and that in the state of the art pertaining to carriage bodies his construction, as shown in the drawings and the models in evidence, is devoid of such originality and novelty as entitled him to a patent.

The court finds it necessary to consider but one of these questions, namely: Is the complainants' combination a patentable invention? Confessedly, all the several parts constituting the combination are old. Stating concisely the invention here claimed, it consists of a corner post made of a single piece of wood, the outer surface of which is oval or semicircular, so as to give to the carriage body rounded corners. Running the whole length of the corner post on each edge is a groove for the reception of the ends of panels, which constitute the sides and ends of the body. At the top of the post, and extending down some distance parallel with the grooves, but cut into the post deeper than the grooves, are recesses into which the ends of the rails are fitted. These rails, and the upper ends of the corner posts, are constructed with a narrow elevation projecting above the body of the rail, so as to furnish means for retaining the seat on the edge of the box. Grooves extend along the entire length of both the upper and lower rails, into which the upper and lower edge of the panels are fitted, and, as thus constructed, the rails externally overlap the panels at both top and bottom. Standards or ordinary posts are inserted at intervals be-

tween the different four corners, being tenoned into the lower and upper rails in the ordinary way. Then corner irons or straps, such as have always been used for a similar purpose, extend around the top and bottom of each corner post, reaching over to the rails to which they are fastened, so as to hold the rails rigidly in contact with the post. The arrangement of the different parts is ingenious, but I do not think, considering the state of the art, that it discloses anything more than the mechanical skill which we constantly see in the workmanship of the shops, and which cannot be called invention without regarding almost every new thing that may be novel, and may possess increased utility, as patentable.

As I have said, each of the parts considered separately is old. It is equally true that parts of the combination, as the patentee has described them, and as they appear in the model, are old. It is common knowledge that corner irons as here applied, and the fitting of panels in grooves to avoid the use of nails and screws, are as old as the workmanship of the village carpenter and blacksmith, as it came from their hands before the days of modern machinery. The covering of the top and bottom of the panel with what are called "rails" in the complainants' patent, has been long seen in all varieties of furniture and wood-work. Rounded corners of wagon bodies were not new when the complainant Calkins obtained his patent, and all that I can see in his improvement is quite an ingenious adjustment of these parts, such as the mechanical skill of one engaged in such work might well suggest.

In *Atlantic Works v. Brady*, 107 U. S. 192, 200, S. C. 2 Sup. Ct. Rep. 225, it was said that it is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures; and in *Thompson v. Boisselier*, 114 U. S. 11, S. C. 5 Sup. Ct. Rep. 1042, it was further said: "It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known; and that it shall be useful; but it must, under the constitution and the statute, amount to an invention or discovery." Instructive language on this subject is found in the opinion of Mr. Justice MATTHEWS, in *Holister v. Benedict & Burnham Manuf'g Co.*, 113 U. S. 59, S. C. 5 Sup. Ct. Rep. 717, where it is said that novelty and increased utility in an improvement upon previous devices do not necessarily make it an invention; and that a device which displays only the expected skill of the maker's calling, and involves only the exercise of ordinary faculties of reasoning upon materials supplied by special knowledge and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of inventive faculty, such as the constitution and the patent laws aim to encourage and reward. Such, in my opinion, is the character of the improvement made by the patentee, Calkins; and though in some respects the adjustment of the

different parts of his combination may be novel, and the combination as an entirety may be, and undoubtedly is, useful, it exhibits only the expected skill of the mechanic's calling, and not the creative work of the inventor.

For these reasons the bill must be dismissed.

CARY and another v. DOMESTIC SPRING-BED Co.¹

(Circuit Court, D. New Jersey. July 28, 1885.)

1. PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION.

Where a patent had been sustained after long and ably contested litigation, and against all the defenses ordinarily set up in patent cases, and such decision had been followed by another court, *held*, on an application for a preliminary injunction, that the question of the validity of the patent was hardly open.

2. SAME.

In such a case, and where the patent has only a short time to run, the owners are entitled to be protected in their monopoly until the defendants are able to show that the former decisions sustaining the validity of the patent were wrong.

In Equity.

Samuel A. Duncan and Wm. E. Witter, for the motion.

Collins & Corbin, contra.

NIXON, J. This is an application for a preliminary injunction, and under the well-established rules and principles governing such applications in this circuit, the motion must prevail. The patent on which the suit is brought is for an "improvement in modes of tempering springs." The invention relates to spiral springs in a conical form, used in upholstering sofas, chairs, and in bed bottoms, and consists in subjecting the springs to a tempering process after they have been completed in the usual manner, whereby their strength and elasticity are greatly increased. In the specifications of the patent the inventor (Cary) states that the ordinary furniture spring is made of hard-drawn wire, coiled and forced to the proper shape, and when this is done the spring is considered finished, without having been subjected to any tempering process other than what is incidental to the drawing of the wire. The metal being greatly condensed and hardened in the process of drawing the wire, a good degree of elasticity is given the wire thereby; but in bending and coiling the wire into the proper shape the metal is unavoidably weakened. The outer portion of the wire coil is drawn or stretched, while the inner portion is crushed or shortened. When straight bars of wire are

¹Edited by Charles C. Linthicum, Esq., of the Chicago bar.

subjected to the bending process, the stretching or drawing of the outer, and crushing of the inner, portions are inevitable results. This greatly reduces the elasticity, strength, and durability of the spring. The patentee claims that he has discovered a method of restoring the wire, after being bent or formed into springs, to its normal condition. He does it by subjecting the spring to a degree of heat known as "spring-temper heat," which is about 600 degrees, more or less, for about eight minutes. He regards this temperature as sufficient to so far relax or produce a complete homogeneity of the metal of the spring as to add from 20 to 30 per cent. to the value of the spring consequent on its increased powers of resistance.

The validity of the complainants' patent was incidentally involved, and perhaps to a limited extent considered, by the supreme court in *Eagleton Manuf'g Co. v. Cary Manuf'g Co.*, 111 U. S. 490, S. C. 4 Sup. Ct. Rep. 593, wherein the question of the priority of invention between Eagleton and Cary was litigated. Nothing, however, was definitely settled in that case except that the Eagleton patent was void. But in 1879 a suit for infringement was brought by the owners of the Cary patent, in the circuit court of the United States for the southern district of New York, against Raphael H. Wolff and others, which was long and ably contested, and in which all the defenses ordinarily set up in patent causes seem to have been involved. Judge WHEELER, before whom the case was tried, sustained the patent against all the defenses. He has been followed by Judge ACHESON in this circuit, (*Cary v. Lovell Manuf'g Co.*, 24 Fed. Rep. 141,) and the question of its validity is hardly open on an application for a preliminary injunction.

The patent is *prima facie* valid. It has been upheld on final hearing after expensive and protracted litigation. It will expire in less than three years, and in the mean time the owners are entitled to be protected in their monopoly until the defendants are able to show that the learned judges who have sustained its validity were mistaken in their judgment.

I express no opinion on the merits, but, at this stage of the proceedings, order the injunction.

NILES TOOL-WORKS v. BETTS MACHINE CO.¹*(Circuit Court, D. Delaware. April 1, 1886.)*

1. PATENTS FOR INVENTIONS—TURNING AND BORING MILLS.

Letters patent No. 113,651, of April 11, 1871, granted to George A. Gray, Jr., for an improvement in turning and boring mills, is not void for want of patentable novelty.

2. SAME—USE OF MACHINE—EVIDENCE OF UTILITY.

Defendant's adoption and use of the patented device in preference to others on the market, *held* a pregnant fact, and strong evidence of the utility of the patented device.

3. SAME—PATENTABLE COMBINATIONS.

A combination is patentable (1) if it produces new and useful results, though all the constituents of the combination were well known and in common use before the combination was made, provided the results are a product of the combination, and not a mere aggregate of several results, each the product of one of the combined elements; (2) if it produces a different force, effect, or result in the combined forces or processes from that given by their separate parts, and a new result is produced by their union; (3) if it either forms a new machine of distinct character or formation, or produces a result which is not a mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements; (4) when the several elements of which it is composed produce, by their joint action, either a new and useful result, or an old result in a cheaper or otherwise more advantageous way.

4. SAME.

Where the attention of persons skilled in the art had been directed for many years to the discovery of a more convenient and effective contrivance, and patentee was the first to produce it, *held*, that something more than the mere application of mechanical skill was involved in his production.

In Equity.

Stem & Peck, for complainant.

Benjamin Nields, for defendant.

WALES, J. The bill prays for an injunction, and an account for profits and damages. Letters patent No. 113,651, dated April 11, 1871, were issued to George A. Gray, Jr., for an "improvement in turning and boring mills," and on the fourteenth of April, 1883, were assigned by the said Gray to the complainant. The first claim of the patentee is for "the tool-bar balancing device, consisting of a rope or chain, U, weight, V, and pulleys, R, R, 'S, T; connected and operating substantially as and for the purpose specified." The nature and objects of the invention are declared to be:

"*First.* In a peculiar device for balancing the tool-bar in any position within its range, in such a way as to keep the weight up against the feed, and thus prevent the bar being forced up by the work when any slack exists in the feed, and permit of the bar being elevated and depressed freely by hand; this balancing device differing from all others for the same purpose in this: that the bar can be moved to any degree of angularity from an upright or other position, and moved with its saddle along the rail horizontally, without changing the location of the weight which balances the bar."

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

That part of the general description referring to the drawings, and specifying the improvement, is as follows:

"A is the bed-plate of the mill; B, B', the housings; C the rail; and D the horizontally sliding saddle, which is snugly fitted to and slides upon the rail; E is the revolving table, operated in the usual way by the large gear-wheel, F, driven (through suitable connections) by the cone pulley, G, and 'back gear,' H. The feeding mechanism for giving a horizontal movement to the saddle, and a vertical or inclined movement to the tool-bar, does not differ materially from others for the same purpose, the saddle being moved by the screw, I, and the tool-bar, K, by the rod, L; the connection to the bar, K, being made by a worm, friction-clutch, worm-wheel, and pinion gearing into the rack, M, on the bar. The down feed can be stopped by the slackening of the wheel, N, which governs the friction-clutch. Both the cross and down feed are driven by the expansible gearing shown, operated by the shaft, O. The rail, C, is designed to be raised and lowered by power; the side screws, P, P', and connecting driving shaft on the top rail, being provided for this purpose. The swing, Q, in which the bar, K, slides, is constructed, as usual, in such a way that the bar can be swiveled to any desired angle to enable the machine to bore and turn tapering, etc. In order to balance the weight of the tool-bar in any position, whether inclined or vertical, in a way that will possess none of the faults attributable to devices heretofore existing for this purpose, I have provided the following device: Pulleys, R, R', are journaled upon the swing, Q; pulley, S, upon the tool-bar; and pulley, T, upon the end of the rail. A rope, chain, or wire cord, U, fastened at one end upon the rail at C', is then passed over the pulley, R, under the pulley, S, over the pulley, R', and over the pulley, T, where it supports a weight, V, which must be slightly heavier than half the weight of the bar, K, only. This device suffices to keep the bar up snugly against the force that feeds it down, so that the tool can never drop when 'slack exists in the feed.' It also enables the swing, Q, to be moved to a very extreme angle without deranging any of the parts, or materially changing the effect of the weight, V, upon the bar, or even disturbing the weight itself. * * * The tool-bar slides between the gibbs, X, on the swing, carrying, of course, the pulley, S, with it."

Boring-mills are large and heavy machines, the tool-bar alone weighing from 200 to upwards of 1,000 pounds. Its tendency, of course, is to slide downwards, and it is therefore desirable, if not absolutely necessary, to counterbalance its weight in order to enable the operator to adjust it easily and safely to different kinds of work. Counter-balances for this purpose had been attached to tool-bars by various devices long before the date of Gray's patent, but none, it is contended by the complainant, with such complete, useful, and advantageous results as are secured by the latter. The first and most common contrivance was known as the "drill style," consisting of a chain or rope run over a couple of pulleys attached to the ceiling above the machine, one end of the chain being hooked to the top of the tool-bar and the other end to a counterbalancing weight. The objections to this mode are that (1) it requires facilities for overhead attachments involving extraneous supports, and thus prevents the machine from being a self-contained structure; (2) the pull of the balancing rope or chain can be directly upward only so long as the tool-carriage or saddle remains in one and the same position on the

rail, for the pulleys being stationary, as the saddle is pushed along the rail either to the right or to the left, the counterbalancing weight produces a resistance to its movement; and (3) when the tool-bar is set at an angle, the pull is no longer in the line of the path of the bar, but sidewise, and the effect of the counter-balance will be to draw the bar back into a vertical position, and thus produce a side friction or binding between the tool-bar and the guides in which it slides. To remedy some of these faults the "trolley style" was designed, in which the chain supporting the counter-balance, instead of passing over a stationary pulley overhead, passes over two pulleys secured in a little traveling carriage, or trolley, which moves on a track secured to the ceiling over the boring-machine. The end of the chain is attached to the ceiling instead of to the tool-bar, and a loop of the chain, hanging down from the trolley, carries a pulley which is fastened to the top of the tool-bar. As the saddle slides along on the rail the trolley overhead moves along its track in the same direction, and so keeps the trolley and pulley directly over the tool-bar, in whatever place the latter may be on the rail. This is an improvement on the simple "drill style," (although the trolley does not always promptly follow the movement of the saddle on the rail, and has to be dragged along;) but it does not provide for a direct pull in the line of the axis of the tool-bar whenever the latter is changed from a vertical position. Another contrivance is the "Bradley style," in which the pulleys are carried in a bracket projecting upwards from the swing; but the objections to this mode are so serious that it does not appear to have gone into general use, and seems now to be discarded. Its great disadvantages were that it formed an additional load upon the saddle, causing it to move hard upon the rail, and the counterbalancing weight, being within the frame-work of the boring-mill, was often in the way of the operator. Moreover, the weight was hung upon one side of the swing, and when this was loosened on the saddle, in order to adjust the bar at an angle, the weight was apt to turn the swing over suddenly, and cause serious damage.

The defendant in its answer sets up several anticipations, but in the proof relies upon the two just described.

It is very clear from the evidence that Gray's improvement is a decided advance beyond all preceding counterbalancing contrivances in boring-mills, not only in providing greater facilities for the prompt adjustment of the bar in any desired position, but in all its various operations and results. The bar is more safely and easily moved when out of a vertical position and with less friction by this mode than by any other before known; and Mr. Betts, the president of the defendant company, referring to the improvement, frankly admits that "it makes a more complete machine, is easier for the operator, and will make more perfect work, with this device on it." Rec. Ev. 12.

The testimony of the experts is, as usual, contradictory. Mr. Car-

michael, a witness for the defendant, who has been in the employ of the Harlan & Hollingsworth Company, at Wilmington, since 1850, and who constructed for them the "trolley style" of counter-balance, cannot perceive any appreciable difference in the force necessary to be used on either machine in elevating the bar when the latter is moved out of a vertical position; but it is a pregnant fact that when the company required an additional boring-mill they preferred one with the Gray improvement, and this is held to be strong evidence of utility. *Tyler v. Crane*, 7 Fed. Rep. 775.

The superiority of Gray's contrivance over all others is, as claimed by the complainant, that (1) it dispenses with all overhead attachments requiring outside supports; (2) the counterbalancing pull is always directly in the line of the axis of the bar, there being no side pull on the bar or swing, and the bar never binds against its gibs; (3) the bar is easily handled, and perfectly safe for the operator; (4) it is cheap and simple, and permits of the addition of a second tool-bar without duplicating the chain that carries the weight. The "Bradley style," it is true, effected the first two of these results with measurable success, but by an arrangement of pulleys entirely different from, and not suggestive of, the Gray device, and in a way that was cumbersome and dangerous to the machine and to the operator. The "trolley style" is also plainly inferior in almost every point touching the movements of the bar, particularly in producing a side strain on the bar when the latter is moved out of a vertical position. The patentee has invented or formed a new combination of pulleys or sheaves on the bar, swing, and rail which was before unknown, which produces admittedly useful and advantageous results in a way excelling all former contrivances for the same purposes; and the only question is whether it is of such a novel and useful character in its arrangements, operations, and effects as to merit the protection of letters patent. The defendant's counsel says:

"In this case Mr. Gray simply transferred the two pulleys from the trolley to the swing, and dispensed with the trolley and the track; and further simply attached one end of his rope or chain to an arm of the machine instead of attaching it to the wall, or some other object not connected with the machine, and transferred pulley, T, to an arm carried by the machine. This is simply a substitution of equivalents,—no more, no less; and the device does substantially the same thing, in the same way, by substantially the same means."

In support of his contention he cites *Smith v. Nichols*, 21 Wall. 112, in which a patent for the manufacture of a textile fabric was held to be void because the article manufactured was of superior excellence in degree only, and not in kind; a fabric substantially the same in structure, and possessing virtually the same properties, having been known and used before. But the court, by Mr. Justice CLIFFORD, said in that case:

"A patentable invention is a mental result. It must be new, and shown to be of practical utility. Everything within the domain of the conception

belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable."

It has also been declared by the supreme court that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not support a patent, even if the new form of result has not been before contemplated." *Pennsylvania R. Co. v. Locomotive Engine Safety Track Co.*, 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; and to the same effect is *Morris v. McMillin*, 112 U. S. 244; S. C. 5 Sup. Ct. Rep. 218. But the same court had already declared, and has since reaffirmed, the doctrine that when a patentee has produced new, useful, or improved results by a new combination of old constituents he will be protected. *Hailes v. Van Wormer*, 20 Wall, 353; *Reckendorfer v. Faber*, 92 U. S. 347; *Pickering v. McCullough*, 104 U. S. 310; *Stephenson v. Brooklyn R. Co.* 114 U. S. 157; S. C. 5 Sup. Ct. Rep. 777.

The propositions established by these cases are that a combination is patentable (1) if it produces new and useful results, though all the constituents of the combination were well known and in common use before the combination was made, provided the results are a product of the combination, and not a mere aggregate of several results, each the product of one of the combined elements; (2) if it produces a different force, effect, or result in the combined forces or processes from that given by their separate parts, and a new result is produced by their union; (3) if it either forms a new machine of distinct character or formation, or produces a result which is not the mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements; (4) when the several elements of which it is composed produce, by their joint action, *either a new and useful result, or an old result in a cheaper or otherwise more advantageous way*. See, also, *Merwin*, Inv. § 135 *et seq.*

These are but varied expressions of the same doctrine.

Here the patentee has undoubtedly produced, if not a new, an improved, result, in a new way, and in doing so has exercised the faculty of invention. The attention of skilled mechanics and engineers had been directed for many years to the discovery of a more convenient and effective contrivance for counterbalancing in boring-mills, and it was reserved for this man to invent a combination which has wrought beneficial results in many ways. This is something more than the mere application of mechanical skill to a change of form, and not of substance, though it may be difficult to distinguish broadly between skill and invention. *Pennsylvania R. Co. v. Locomotive Track Co.* and *Morris v. McMillin*, *supra*, are fair illustrations of the application of old contrivances to analogous results without

the invention of new combination, or the production of new or improved results.

In this case, the patentee has invented a new combination which produces, in a new and better way, new and improved results. In the words of Justice CLIFFORD: "It is a new idea ingrafted upon an old invention, distinct from the conception that preceded it."

Let a decree be entered for the complainant.

TATE v. THOMAS.

(*Circuit Court, S. D. New York. December 28, 1885.*)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—TATE QUILTING-MACHINE.
Former opinion, 22 Fed. Rep. 660, adhered to.

2. SAME—IMPROVEMENT ON MACHINE.

Where, by the addition of certain elements, a machine is made which is properly the subject of a patent, as an improvement on a machine which it is claimed to infringe, it does not follow the original machine has not been infringed.

In Equity.

Edwin H. Brown and Edward N. Dickerson, for complainant.

Solomon J. Gordon, for defendant.

WALLACE, J. A careful study of the Nicoll patent, aided by the testimony of the experts for the parties, has resulted in the conviction that this patent has no material bearing upon the validity or the construction to be given to the eighth claim of the complainant's patent. It shows a series of needles set in two rows, with longitudinal and lateral feeding devices, in a sewing-machine organized to stitch pieces of fabric together by double rows of stitching in parallel lines. There is no fair suggestion in the patent of any organization of needles and feeding devices by means of which the lines of stitching made by the needles are to have any such relation to each other as is indispensable to produce the result contemplated and effected by Tate, viz., to produce a diamond pattern by the juxtaposition of the parallel zigzag lines at the angles of the apexes.

The troublesome question in the case is whether the defendant's machine, constructed pursuant to the specification of the patent to Manning A. King, of June 9, 1874, is an infringement of the eighth claim of the complainant's patent; and the patent to Nicoll does not afford any assistance in its solution. This question has been fully reconsidered since the hearing of the cause, and the conclusion originally reached has been confirmed, although not without some vacillation of opinion. The defendant's machine produces diamond patterns by employing the alternating needles, with the necessary feed-

ing devices, which are the subject of the claim, and to the extent to which these parts co-operate to produce the new result of the patent (whether that be considered the making of the diamond pattern or making them by conjoining zigzag lines of stitches) it is not apparent that there is any difference in their mode of operation in the patent and in the machine. If it be conceded that King, by employing additional needles, has made a machine which is properly the subject of a patent as an improvement upon Tate's, it does not follow that he has not appropriated Tate's invention.

HOFF and others v. IRON-CLAD MANUF'G Co.¹

(Circuit Court, S. D. New York. April 10, 1886.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIM—INFRINGEMENT.

The first claim of letters patent granted June 19, 1883, to Charles Hoff, was for "the method of forming the body of a coal-hod or other similar vessel, which consists, substantially, as before set forth, in first forming a cone-shaped body from a suitable blank, then folding in the cone end of said body in crimps, to form the bottom." Defendant formed only a part of its coal-hod bottoms by folding in the sides, and then closed the space between the folded ends with a cap. *Held*, that Hoff's first claim should not be limited to a method in which a perfect cone-shaped body is first made, and that defendants infringed said claim.

2. SAME—HENRY S. REYNOLDS' PATENT OF AUGUST 26, 1883.

This patentee may have made a patentable improvement over Hoff's device, but it contains the essentials, and is an infringement of the first claim of the Hoff patent.

In Equity.

Arthur V. Briesen, for complainants.

Ernest C. Webb, for defendants.

WALLACE, J. This suit is founded on a patent granted to Charles Hoff, June 19, 1883, for a coal-hod. The claims of the patent are as follows:

"(1) The method of forming the body of a coal-hod or other similar vessel, which consists, substantially, as before set forth, in first forming a cone-shaped body from a suitable blank, then folding in the cone end of said body in crimps, to form the bottom.

"(2) As a new article of manufacture, a coal-hod formed of a single piece, and having its bottom crimped or folded, to form a series of annular ribs or rings of progressively increasing diameter, substantially as shown and described."

The patentee was the first to perceive the advantages of making a coal-hod in which the sides and bottom should be formed out of one piece of metal in such manner that the bottom, while be-

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

ing integral with the sides, should at the same time be thicker and stronger than the sides, in order to sustain the extra wear to which it is subjected in use. He described in his specification the mode of making such a coal-hod, as consisting — *First*, in cutting a piece of sheet-metal into a blank adapted to being bent around a cone-shaped former, bending the metal around the former, and uniting its edges; *secondly*, in pressing the metal at the cone end of the structure into a series of crimps or folds, making a partially formed bottom; and, *thirdly*, in flattening the partially formed bottom to complete the hod. By this mode of making the hod the surplus metal taken up by the sides of the folds or crimps is utilized to increase the strength and thickness of the bottom. The defendant is making a coal-hod such as is described in the patent granted to Henry S. Reynolds, August 26, 1884. Reynolds was an employe for the defendant when a coal-hod made conformably with the complainants' patent was shown to him. He availed himself of that feature of the patent which consists in using the same piece of metal to form the sides and bottom, so that the bottom will be of an increased thickness of metal; and in order to decrease the cost of production, or to evade the patent, he concluded to form only a part of the bottom from the metal of the sides, by folding in the sides, and then closing the space between the folded ends with a cap. He describes in his specification the cutting of his sheet-metal into a suitable blank, the bending of the blank, and uniting the metal at the edges, the compression of the bottom end of the structure between dies of suitable shape to form a series of radial ribs, and then flattening of the ribs by compression, "thereby partially forming the bottom of the vessel out of a portion and in one piece with the body, the walls of the ribs folding in upon the metal between them, and thus increasing the thickness of metal throughout a portion of the bottom, and consequently increasing the strength," etc.

The second claim of his patent is as follows:

"(2) A vessel comprising a sheet-metal body, having its lower edge crimped or folded inwardly, and a cap engaging said crimped edge, and flattened down inside and outside the same, to embrace it, to form the bottom of the vessel, and substantially as described."

It may be that such a hod can be made at less expense than the hod of the complainant's patent, and, if so, that Reynolds made a patentable improvement, but he has taken Hoff's invention in essentials. He left out part of Hoff's bottom, and substituted a cap for the rest. Hoff, in the specification of his patent, expressly states that he does not desire to limit himself to any particular form of crimp or fold for the bottom of the hod. He also points out that the form given to his structure before the cone end is flattened into a bottom may be changed, and still have a tapered end, the metal of which may be compressed to fold over and strengthen the bottom. He was not limited to any narrower claim than the specification al-

lows by the prior state of the art. Such a construction should be given to the first claim of his patent as will cover his real invention, and it therefore should not be limited to a method in which a perfect cone-shaped body is first made.

It is held that the defendant infringes the first claim of the complainant's patent. The second claim is not infringed. The defendant's hod does not have a botton so crimped as to form a series of annular ribs, or rings of progressively increasing diameter. A decree is ordered accordingly.

THE NATCHEZ.¹

VAN HORN v. THE NATCHEZ.

(Circuit Court, E. D. Louisiana. January 27, 1886.)

1. ADMIRALTY—PRACTICE—MOTION TO DISMISS APPEAL.

Where an appeal in admiralty has been taken by petition and citation, and the appellee has been served with notice and appeared in the circuit court, the appeal has a standing irrespective of the bond. *The City of Lincoln*, 19 Fed. Rep. 460, distinguished.

2. SAME.

The appearance of the appellee, and his participation in taking evidence in the appellate court, estop him from denying that there is a valid appeal pending. If, in the opinion of his proctor, another and more specific bond is necessary for the due prosecution of the appeal, the appellants will be directed to furnish one.

Admiralty Appeal. On motion to dismiss.

Ernest B. Kruttschnitt, for libellant.

O. B. Sansum, for claimant.

PARDEE, J. This case has been submitted on a motion to dismiss the appeal on the grounds that (1) there has been no bond given in this cause to the claimant; (2) the bond given in this cause is not such as the law demands.

The bond given is in favor of "the owner of the steam-boat Natchez, claimant." The record discloses that Thomas P. Leathers is the owner of the Natchez, and is the sole claimant in the case. It is urged that the bond should have been in favor of the claimant by name, and that the defect is fatal to the appeal. The record further discloses that the appeal was allowed after term on a petition; that citation issued and was served on proctor for claimant, the claimant himself being absent from the district; and the proceedings in this court show an appearance by proctor for Leathers, claimant, and evidence taken, prior to the motion to dismiss.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The case of *The City of Lincoln*, decided by this court in 1883, and reported in 19 Fed. Rep. 460, and a late decision in this court in the case of *Mason v. Irvine*, ante, 240, are relied on to sustain the motion to dismiss. In *The City of Lincoln*, supra, a number of libelants, with separate interests, had joined in a libel, and all had recovered judgment in various sums in the district court. The motion for appeal was against Kelly and others, and the bond was in favor of Daniel Kelly and intervening libelants. In *Mason v. Irvine* the suit was against a large number of persons; the motion for appeal was entitled in no particular case; the bond was entitled in the case of "*J. L. Mason v. John Irvine et al.*," and was in favor of "*John Irvine et al.*, the respondents 'above mentioned.' " In each case it was held that the bond was apparently the only appeal process to bring the case to this court, and as that was defective, upon the adjudged cases of *Smith v. Clark*, 12 How. 21; *Deneale v. Stump*, 8 Pet. 526; *Holli-day v. Batson*, 4 How. 645; and *The Protector*, 11 Wall. 82,—it was decided that there was no appeal against any other party than the one mentioned specifically in the bond; and, further, that no amendment could be allowed, the effect of which would be to bring new parties into the case on appeal. The present case is entirely different. An appeal has been taken by petition and citation, the party has been served with notice and has appeared, and the appeal has a standing irrespective of the bond.

In *Peugh v. Davis*, 110 U. S. 227, S. C. 4 Sup. Ct. Rep. 17, and in *Dodge v. Knowles*, 114 U. S. 430, S. C. 5 Sup. Ct. Rep. 1197, it was held that where a valid appeal has been taken either by motion, or by petition and citation, that the giving of the bond was not essential to the taking, though it might be to the due prosecution of the appeal, and that, in proper cases, the supreme court would give permission to supply the defective bond before dismissing the appeal. Under sections 1005 and 1012 of the Revised Statutes the supreme court can undoubtedly allow an amendment in an appeal process when the statement of the title of the action or parties thereto is defective, if the defect can be remedied by reference to the accompanying record. Whether the circuit courts have such power, or are hampered, as was the supreme court prior to the enactment of section 1005, (see *The Protector*, 11 Wall. 82; *Moore v. Simonds*, 100 U. S. 145; *Gumbel v. Pitkin*, 113 U. S. 545; S. C. 5 Sup. Ct. Rep. 616,) is at best doubtful, and in the present case it is not necessary to decide.

The appearance of the claimant, and his participation in taking evidence in the court, estop him from denying that there is a valid appeal pending. If, in the opinion of his proctor, another and more specific bond is necessary for the due prosecution of the appeal, the appellants will be directed to furnish one; but the motion to dismiss is denied.

THE WESLEY A. GOVE.*

District Court, D. Massachusetts. April 6, 1886.)

COLLISION—DIMINISHED VISION DEMANDS DIMINISHED SPEED—RULES OF THE ROAD—CONSTRUCTION OF—NINETEENTH RULE—STEAM-WHISTLE—INSPECTORS' RULES—HALF DAMAGES.

A steamer, shortly after backing out from her wharf, was obliged to stop and reverse in order to thereby avoid colliding with a schooner. While lying motionless, she was run into by a tug. The latter vessel was, at the time, crossing the steamer's track from starboard, so that the position of the vessels was that the steamer had the tug on her own starboard side. *Held*, that it was the duty of the tug, under the circumstances, to have kept out of the way of the steamer, notwithstanding the fact that if both vessels had been under way their courses would have been crossing, and their respective obligations reversed. The steamer being motionless, and without the power to alter her position immediately, must be considered as a vessel at anchor, and rule 19 is therefore inapplicable. *Held*, that if the circumstances were such as to obstruct partially the range of vision, it was incumbent on the tug to have stopped or slowed. *Held* that, both by usage and law, "in a crowded harbor, in the vicinity of wharves, steamers are required to sound their whistles as often as may be necessary to guard against collision," and that the steamer, notwithstanding her position, was at fault in this regard.

In Admiralty.

L. S. Dabney, for libellant.*J. C. Dodge & Sons*, for claimant.

NELSON, J. This case was a libel for collision, by the Boston & Hingham Steam-boat Company, as owner of the *Rose Standish*, a passenger steam-boat plying between Boston, Pemberton Landing, and Strawberry Hill, against the steam-tug *Wesley A. Gove*. On the twenty-fourth of August, 1884, at 5:15 p. m., the *Rose Standish* backed out of her dock on the north side of Rowe's wharf, in Boston, with her stern to the southward, on her afternoon trip down the harbor, having on board about 100 passengers, and proceeded in a north-easterly direction to pass round a group made up of a dredging boat, several mud scows, and a tug-boat, employed in dredging the flats, and stationed some 200 yards off Central wharf, the second wharf north of Rowe's wharf. As she was rounding the dredging group under a port wheel, her engine was stopped and reversed to avoid a schooner on her port bow bound out. She had gone past the dredger about three lengths, and had come nearly or quite to a standstill, when the tug, which was crossing the harbor from the South Boston side, ran into her starboard bow at the forward gangway, and sunk her.

There is sufficient proof that the *Rose Standish* stopped and reversed to avoid the schooner, though this is denied by the owners of the tug, and the schooner does not appear to have been seen by the men on the tug. The fact is proved by the testimony of a large num-

Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

ber of witnesses who were at the time on the *Rose Standish*, or on the wharf, in positions to observe the situation, and I do not think they can be mistaken. The claim of the tug is that under rule 19, then in force, she had the right of way, being on the starboard side of the *Rose Standish*, and that it was the duty of the latter to keep out of her way. But the stopping of the *Rose Standish* was made necessary by the exigencies of her navigation, and this the tug ought to have seen, and governed her own movements accordingly. In such a situation the *Rose Standish* was not a crossing vessel, within the rule; but being stationary, and without power to alter her position immediately, was rather like a vessel at anchor or moored to a wharf, and other vessels, having in view her situation, were bound to avoid her. The master of the tug admits that the *Rose Standish* was not seen from the tug until too late to prevent the collision by any maneuver possible. He says that his own view was obstructed by the mud-digger, and by the westerly sun shining in his eyes from over the port bow. Both these excuses are manifestly frivolous. If for either reason he had not a clear view over his port bow towards the wharves, from which direction vessels were likely to be coming at any moment, he should have stopped or slowed. The afternoon was bright and clear, and his failure to see the *Rose Standish* could only have been caused by inattention.

As I read the evidence, the conduct of the tug was this: She had no lookout forward. Her master was alone in the pilot-house, at the wheel, and was the only person on board attending to the navigation of the boat. When he first saw the *Rose Standish* she was over his port bow, not 30 yards away. As he caught sight of her, his first thought was that she was coming at full speed, and was about to run him down; and to save his own boat, though at the expense of the other vessel, he gave the signal to the engine-room to stop and back, put his wheel hard to starboard, and plunged into her.

The owners of the tug also allege that the *Rose Standish* did not sound her whistle to give warning of her approach. This is admitted by the *Rose Standish*. Her master testifies that when he rang to stop and back to keep out of the way of the schooner, the pilot called his attention to the tug, then 600 feet away, and said to him he "thought she would run into us." To this the master replied, "I guess not," and went on attending to the schooner. For his failure to give the signal at this time he assigns no reason. For not giving it when his boat had come to a stand-still, he says he did not understand he was bound to do so, his boat not being "in motion or running." In the situation in which he was placed he was required, both by the regulations of the supervising inspectors and the usages of the port, to sound his whistle. By the inspectors' rules, in a crowded channel, or in the vicinity of wharves, "steamers must be run and managed with great caution, sounding the whistle as may be necessary, to guard against collision or other accidents." Had the *Rose Standish* ob-

served this rule, the attention of those on the tug would undoubtedly have been aroused in season to stop or pass astern. She had no right to presume that the tug would see and avoid her if she failed to observe the precautions prescribed by law and usage. The negligence of the tug affords no excuse for the negligence of the steam-boat.

As I find both vessels at fault, the libellant is entitled to a decree for one-half the damages. Ordered accordingly.

THE F. I. MERRYMAN.¹

(District Court, E. D. New York. April 5, 1886.)

SALVAGE—VESSEL WITHOUT NAVIGATOR AND VESSEL SINKING—SALVOR SAVING HIS LIFE IN ACT OF SALVING—AWARD.

The bark S., being in a sinking condition, and without boats, met the brigantine M., which had on board her crew alone, the master and mates having died, leaving no one capable of navigating her. The master of the S. thereupon abandoned his vessel, and, with all his crew, went on board the M., and brought her safely to port without further difficulty. Libels were thereafter filed for salvage against the M. by the master and crew of the S. The value of the M. and her cargo was \$50,000. *Held*, that the service rendered to the M. by the master of the S. was a salvage service, and the fact that in rendering it he was probably saving his own life did not defeat his claim; \$1,000 was therefore awarded him. But as the M. was in need of a navigator only, the services rendered by the crew of the S. were not salvage services, and they could not recover.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libellants.

John E. Parsons, for claimants.

BENEDICT, J. This is an action by the master and crew of the German bark *Friederich Scalla*, to recover salvage from the brigantine *F. I. Merryman*, her cargo and freight. The facts are not in dispute. On August 20, 1885, the brigantine *Merryman* sailed from Bathurst, on the Gambier river, with a cargo of hides, for Boston, Massachusetts, under the command of Capt. Nickerson. She had no mate, her mate having died in July. Her crew consisted of the master, two seamen, an African shipped in Bathurst, and the cook and steward, a colored man. On the day after sailing the master was taken sick, and died on the first of September. On the same day the master died the second mate was taken sick, and on the eleventh day of September he died. Before dying the captain told the cook and steward, in case the second mate should be sick, to take command of the vessel, and steer between N. W. and N. W. by N., and he would probably hit some port in America. When the captain died, the cook and steward, whose name was William Henry Furbert, took command. He was no navigator, nor was there any person on board able to take

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

an observation. The bark was steered as the captain had directed, and on the twenty-first day of September the sails of a bark were discovered ahead, which proved to be the German bark *Friederich Scalla*. As the vessels neared each other an ensign was hoisted on the *Merryman*, and about the same time it was discovered that the *Scalla* had also a signal flying. When within hailing distance the *Merryman* reported herself as 32 days from Bathurst, and in want of a navigator. The *Scalla* reported herself as 50 days from Stettin, and without boats. A boat was sent to her from the *Merryman*, when it was ascertained that the *Scalla* had been disabled on the ninth of September, and was at the time in a sinking condition; that she had lost all her boats, and the master had been desirous of abandoning her for several days. Thereupon the master, the mate, and 10 men, comprising the crew of the *Scalla*, left their own vessel, and went on board the *Merryman*, taking with them, in five trips of the boat, their clothes, nautical instruments, and some provisions. The master of the *Scalla* then took command of the *Merryman*, altered her course, and proceeded towards Boston. When off New York, being somewhat short of water, it was thought best to go to New York instead of Boston, and on the seventh day of October she arrived in New York, having met with no disaster or bad weather, and the vessel and her cargo being in good condition. From the time the master of the *Scalla* took charge of the *Merryman*, most of the ship's work was performed by the mate and sailors of the *Scalla*. Two of the crew of the *Merryman* were able to work, and took turns at the wheel. The cook and steward did little or nothing, being worn out.

Out of this state of facts has arisen this claim of the master, mate, and seamen of the *Scalla* to be paid a salvage compensation for their services on board the *Merryman*.

It cannot be doubted that a salvage service was rendered to the *Merryman* by the master of the *Scalla*. The *Merryman* was in distress for want of a navigator; he supplied that want. His presence on board changed the condition of the *Merryman* from a situation of considerable peril to one of comparative safety. By means of his knowledge and skill the *Merryman* reached port, and without loss to her owners. I can see no ground on which to deny him a salvage reward for the services he rendered. It is true that saving his own life was one, and perhaps the principal, motive which induced him to leave his own sinking vessel and join the *Merryman*; but it has several times been held that the existence of such a motive affords no ground for refusing salvage reward. *The Two Friends*, 2 W. Rob. 349; *The Merrimac*, 1 Ben. 201.

The contention on behalf of the claimants is that instead of furnishing a navigator to the *Merryman*, the entire crew of the *Scalla*, for the purpose of saving their own lives, went on board the *Merryman*, and no individual was separately designated to render service. By their own arrangement they constituted a unit. Treated as

such, the service rendered by the Merryman to all was more than the equivalent for the services rendered to the Merryman. But surely the master of the Scalla was, by the attendant circumstances, designated to render to the Merryman precisely the services she needed, namely, those of navigator and master. These services he did render, and in so doing he assumed responsibilities if not more serious than those from which he escaped, certainly different, but which he was under no obligation to assume. It seems to me to be no answer to his claim for compensation for this service to say that the services rendered to the Merryman by others who went on board the Merryman were more than compensated by the saving of their lives by means of the Merryman.

Besides, the question is never a mere question of equivalent for services rendered. When a salvage service is shown in a court of admiralty, it is the duty of that court to see that more than an equivalent is given for the services, and this upon grounds of public policy. The rendition of a salvage service to the Merryman by the master of the Scalla entitles him, therefore, to ask of this court a salvage compensation, whatever may have been the benefit received from the Merryman by others of the crew of the Scalla. He was nine days in command of the Merryman. He met with no storm or unusual circumstances. To say the least, his anxieties were diminished, rather than increased, by taking charge of the Merryman. The value of the Merryman and her cargo was some \$50,000. I think the master should be paid a thousand dollars as his reward.

In regard to the other persons, 11 in number, who went from the Scalla to the Merryman, and who, under the direction of the master of the Scalla, navigated the Merryman to New York, the case is different in this: that while they rendered useful services, and relieved a small crew, no doubt much worn by labor and anxiety, their services in no way differed from the services they would have performed on board their own vessel; certainly they were no more important or arduous in character. These services were not necessary to the Merryman, for her crew, with the aid of a navigator, would have brought her in safely. Nor were these services requested. The services of a navigator were required, and only the services of a navigator were asked of the Scalla. The services of the others were rendered voluntarily, because, not daring to remain on their own vessel, they obtained permission to come to the Merryman. These services were not those of salvors. They were not necessary to the salving of the bark. They were not requested by the bark's crew, who remained in possession of their vessel. They were accepted because voluntarily tendered, and they must be deemed to have been rendered as an equivalent for the benefit they received.

There must therefore be a decree in favor of the libellant Augustus Hoffschild for the sum of \$1,000, and the costs of this action. As regards the other libellants, the libel is dismissed, without costs.

THE SWALLOW.¹

ALLEN v. SEVEN HUNDRED AND EIGHTY-FIVE TONS OF COAL.

(District Court, E. D. New York. March 29, 1886.)

DEMURRAGE—DESIGNATION OF WHARF—IMPROPER PLACE.

The ship *Swallow*, laden with coal, arrived in New York harbor, January 29th. Her charter-party provided that she should discharge at a wharf designated by consignee, "not above East-river bridge." The consignee designated a wharf above the bridge, and where there was not sufficient water for the ship. This place the ship rejected, and, it being dangerous for her to remain in the stream on account of ice, she went to Boston wharf. On February 12th, no other place having been offered mean time, after notice to the consignee, she began to discharge at Boston wharf. On the following day the consignee sent lighters, into which the rest of the coal was delivered; and on February 23d the discharge was completed. Twenty days elapsed between the time that she was ready to discharge and the time when the coal was all out. At the rate fixed by the charter, she could have been discharged in eight days. *Held*, that the ship was entitled to recover demurrage, at the charter rate, for twelve days.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

Souther & Steadman, for claimants.

BENEDICT, J. The case presents a question in respect to demurrage, between the owner of the ship *Swallow* and the consignee of a cargo of coal, laden on board that ship at Leith, in pursuance of a charter-party. The charter-party contained a provision that the coal should be delivered in New York according to the bills of lading; and also provided that the consignee of the coal at New York should receive the same "from along-side the ship, not above East-river bridge, at a wharf designated by them; ship to discharge at the rate of 100 tons per working day during the regular custom-house hours, sufficient depth of water being provided along-side the wharf, the ship paying wharfage, and so end the voyage; demurrage, if any, to be paid at the rate of four pence sterling per ton register *per diem*." The bill of lading provided for the delivery of the coal at the port of New York, the danger of the seas excepted, to Perkins & Co., on their paying freight for the goods, with all other conditions as per charter-party. The charter-party also gave the ship the privilege of loading, for the ship's benefit, a quantity of paper stock above the coal.

The ship arrived in New York harbor, January 29th. The consignee was on the same day notified of her arrival, and then designated the foot of Fourteenth street as the place selected for the landing of the coal. The place thus designated was not in conform-

¹ Reported P. D. & Wyllys Benedict, Esq., of the New York bar.

ity with the charter, because not only was it above the East-river bridge, but the bulk-head had not sufficient water for the ship. The place was therefore rejected, and as at the time the ice running in the harbor rendered it dangerous for the ship to remain in the stream, she proceeded to Boston wharf, where she was duly berthed on January 30th. There she discharged the paper stock, the same being all discharged by February 4th. No other place for the discharge of the coal having been designated by the consignee, nor lighters sent to remove the coal from along-side the ship, on February 11th the discharge of the coal at Boston wharf was commenced, after notice to the consignee. On the next day the consignee sent lighters, into which the rest of the coal was delivered along-side the ship, as she lay at Boston wharf. On February 22d the discharge of the coal was completed.

At the rate of 100 tons per day, 8 days would have been used to discharge the coal. The time that elapsed between the time when the ship was ready to discharge at Boston wharf and the time when the coal was all out was 20 days. Allowing 8 days of this as the time to be used by the consignee in receiving the coal, leaves 12 days of detention, for which the libellant claims demurrage at the rate of \$97 per day.

It has scarcely been contended that the ship was bound to go to Fourteenth street; not only was it above the bridge, but there was not sufficient water. The main ground upon which the claim to demurrage is disputed is that the designation by the consignee of Fourteenth street as a place of discharge gave the ship the right at once to discharge the coal on Boston wharf, and that her delay up to February 11th to commence to discharge there was caused by her own procrastination, and not by the consignee. But it is to be considered that it was known to all that the coal was not intended for general use, but for the use of the gas company, at Fourteenth street. Every one knew that Boston wharf was not where the coal was wanted. The ship, therefore, had the right to suppose that the consignee would either send lighters to take the coal from the ship at Boston wharf, or designate some other place for the discharge. No lighters were sent to the ship until February 12th. This was not because of ignorance as to where the ship was, but the time was consumed by the consignee in an effort to induce the ship to go to Fourteenth street. The consignee having no right to require the ship to go to Fourteenth street, if unable to designate another place of discharge, should have sent lighters to receive the coal along-side the ship at Boston wharf. By so doing the consignee would have received his coal without delay to the ship. The omission by the consignee to send lighters was for the sake of taking the chance of inducing the ship to go to Fourteenth street. The consignee having taken the chance, and lost, the delay that resulted should be at his expense, and not at the expense of the ship.

My conclusion is that the libelant, Mary E. Allen, is entitled to recover for 12 days' demurrage, at the rate of \$97 per day, and for the same reason the libelant is entitled to recover the freight without deduction for wharfage or lighterage.

THE GIULIO.¹

(District Court, E. D. New York. December 15, 1885.)

BOTTOMRY BOND—HYPOTHECATION OF VESSEL—NOTICE TO OWNER—APPROVAL.

Where the master of a bark at Tarragona executed a bottomry bond, binding the vessel and freight for advances and necessary disbursements, but it appeared that, when the bond was made, the owner was within reach of the master by telegraph from Tarragona; that a letter would have been received by him in five days; and that he was in actual communication with the master while the vessel was at Tarragona, but the latter never notified him of his intention to borrow money on the credit of the ship, or obtained his approval: *held*, that the contract, so far as it affected the vessel and freight, was void.

In Admiralty.

Wilcox, Adams & Macklin, for libelants.

Goodrich, Deady & Platt, for claimant.

BENEDICT, J. The action against the Italian bark *Giulio*, and her freight money, is founded upon a written instrument, in the words and figures following:

"I, the undersigned, master of the Italian bark *Giulio*, now at Tarragona, loaded with oil and almonds, and ready to sail for New York, have received from Messrs. McAndrews & Co., of this city, the sum of \$836.72, claimed for advances and necessary disbursements on said vessel to enable her to proceed on her voyage; which sum I promise to pay to the said Messrs. McAndrews & Co., or to their assigns, or to their order, ten days after the arrival of said vessel at said port of New York, or any other port at which the present voyage may end; and for the payment of said sum I hereby bind my vessel and owners, and I assign and transfer so much of the freight money as may be necessary, and authorize said Messrs. McAndrews & Co., their assigns and transferees, to receive and collect such freight money at any port of discharge.

P. MARTINGARO.

"Tarragona, second August, 1885."

The person by whom this instrument purports to be signed was the master of the bark, who possessed an imperfect knowledge of the English language, in which the instrument is written. One of the defenses set up is that the master never executed the instrument, and that his name attached thereto is a forgery. Upon this point I incline to the opinion that the signature attached to the document is genuine, but I am far from believing that the contents of the document were correctly stated to the master, or known to him when he signed it.

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

I do not, however, rest my decision upon this point; for, whatever may be the truth in regard to the signing of the document, I am of the opinion that it must be held invalid, for the reason that the execution of such a contract was not within the scope of the master's authority, under the circumstances disclosed by the testimony. The contract is, in legal effect, a contract of bottomry. It is executed by the master of a ship, and it purported to bind the vessel and her freight for money borrowed, the repayment of which is made dependent upon the performance of the voyage. Inasmuch, therefore, as the evidence shows that the owner of the vessel was at Castel-a-Mare, in Italy, within reach of the master by telegraph, and that a letter from Tarragona would reach him in five days, and he was in actual communication with the master while the vessel was at Tarragona, it was necessary for the validity of the contract that the owner be notified of the master's intention to borrow money on the security of the ship, and his approval first obtained. There is no evidence of such approval or notification, and for this reason the contract, so far as it affects the ship or her freight, must be declared void, without considering the other points of objection to the validity of the instrument.

THE CITY OF CHESTER.¹

RUTTER v. THE CITY OF CHESTER.

(District Court, E. D. New York. April 7, 1886.)

COLLISION—STEAM-BOAT AND TUG—CONFUSION OF LIGHTS—LOOKOUT—NEGLIGENCE.

Where two tugs bound from the East river into the North river, in New York harbor, were approaching the steam-boat C., in the night, one at a course to pass outside of the steam-boat, and the other inside; and the steam-boat apparently confused their lights, and so sheered in, under the supposition that there was but one tug approaching, and so collided with and sank one of the vessels: *held*, that more careful attention on the part of the steam-boat would have prevented the mistake, and also the collision, for which the steam-boat was held liable.

In Admiralty.

Carpenter & Mosher, for libellant, James H. Rutter.

Wilcox, Adams & Macklin, for claimants.

BENEDICT, J. I am unable to discover how the fact that the Alice carried two vertical lights in addition to her side lights was a fault conducing to this collision. Her vertical lights were seen, and her side lights ought to have been seen. If due attention had been paid

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

by those on the City of Chester, they would have discovered the Alice coming towards the North river on a course inside of theirs, and would have held their course, instead of sheering in to the New York shore, as they did, under the supposition that a single boat was approaching, and outside of them. The explanation of the collision is doubtless this: The Alice and the Eagle both left the pier in the East river, one soon after the other. Both these tugs were bound into the North river, and both, after leaving their pier in the East river, rounded about to gain a course for the North river. The Eagle went down outside of the Alice. The City of Chester was seen by both of the tugs to be approaching them from the North river. The Eagle took a course outside of the City of Chester, and passed her safely on the outside. The Alice took a course inside the City of Chester, and was sunk by the City of Chester, because of a sheer by the City of Chester towards the docks, and upon the Alice, then inside of her. There are many things in the testimony indicating that the City of Chester, although she may have at first seen the vertical lights of the Alice as she says, afterwards confounded those lights with the lights of the Eagle, which was passing outside, and so sheered in, under the supposition that there was but one tug approaching, and that on a course outside, when the fact was that there were two tugs approaching, one outside and the other inside of her. More careful attention on the part of those on the Chester would have prevented this mistake, and also prevented the collision.

The libelant must have a decree.

CITY OF GALESBURG v. GALESBURG WATER Co. and others.

(Circuit Court, N. D. Illinois. 1886.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

S. made an agreement with the city of G. for the construction by him of water-works, and the supply of the city with water, the city by its ordinance granting to S. and his assigns the exclusive franchise for this purpose, for a definite period of time. S. afterwards assigned his franchise, and the city of G. subsequently filed a bill in the state court against the assignee alone, seeking, on grounds therein set forth, to have the franchise vacated and annulled. After the agreement between S. and the city of G. had been entered into, the assignee executed a mortgage upon its property and franchise to the F. L. & T. Co., of the City of New York, for the purpose of raising money thereon. In the progress of the cause the F. L. & T. Co., upon their application, were admitted as a party defendant, and upon their motion the cause was removed to the circuit court of the United States. Upon a motion by the city of G. to have the cause remanded to the state court, *held*, that as the record shows a separable controversy between the F. L. & T. Co., a citizen of the state of New York, and the city of G., the motion to remand must be overruled. *Held, further*, that although the contract between S. and the city was between citizens of the same state, yet as the franchise was assignable, any property rights which had accrued to citizens thereunder in other states may be litigated in this court.

Motion to Remand.

Mr. Carney, Mr. Willoughby, and Mr. Ryan, for complainant.

Mr. Ryerson and Mr. Barry, for defendant.

BLODGETT, J. The case now comes before us upon a motion to remand the same to the circuit court of Knox county, from whence it was removed on the application of the Farmers' Loan & Trust Company, one of the defendants herein. The original bill was filed by the city of Galesburg for the purpose of setting aside an agreement made between the city and Nathan Shelton, or his assigns, for the construction and maintenance of water-works in the city of Galesburg, said agreement having been made May 17, 1883, by the adoption of an ordinance by the city granting to Shelton and his assigns the exclusive franchise for supplying the city with water for the term of 30 years. The franchise thus granted to Shelton was by him assigned about August, 1883, to the Galesburg Water Company, and the construction of the water-works contemplated by the ordinance was entered upon by said company. In the latter part of 1884 the original bill in this case was filed in the Knox county circuit court by the city of Galesburg against the water company alone, charging that Shelton and the water company, as his assignee, had failed to comply with the conditions of their contract with the city, and seeking a decree vacating the rights granted under the ordinance. The water company answered the bill, and filed a cross-bill, and on the twenty-third of February last the Farmers' Loan & Trust Company, a corporation of the city and state of New York, intervened in said case, representing to the court that the water company, on the first day of August, 1883, executed a mortgage upon all of its property, rights,

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and franchises, including the right to construct and maintain water-works in the city of Galesburg, as secured by said ordinance, for the purpose of securing an issue of 125 bonds of \$1,000 each, which mortgage had been duly recorded, and the bonds thereby secured had been sold for value upon the open market without notice of any default or violation of the conditions of the ordinance by the water company; and such proceedings were had on the application for intervention that said Farmers' Loan & Trust Company was permitted by the court to become a party defendant to the original bill; and thereupon the loan and trust company filed its demurrer to the original bill, and also filed its petition and bond in due form for the removal of the cause to this court. The record being brought here, the cause was docketed *pro forma*, and the city of Galesburg now moves to remand the cause on the ground that it is not a removable case within the provisions of the statutes of the United States upon that subject.

Upon the first presentation of the motion to remand I was of the impression that the controversy shown by the record was wholly between the city of Galesburg and the water company, and that the Farmers' Loan & Trust Company, as the mortgagee of the water company, stood solely in the shoes of, and represented only the rights of, the water company as against the city; and an order was made directing that the case be remanded to the state court from whence it came. A motion for a rehearing was made, and being satisfied from suggestions made on the presentation of this motion that I had acted hastily, the order remanding the case was set aside, and the matter set for further argument. This argument has been had by briefs presented by counsel upon each side, which have been duly read and considered.

The only question in the case is whether the record shows a separable controversy between the Farmers' Loan & Trust Company, a citizen of the state of New York, and the city of Galesburg. It appears from the petition for removal that it is claimed on the part of the Farmers' Loan & Trust Company, trustee in the mortgage, representing the mortgage bondholders, that the mortgage was executed and delivered, and the bonds sold, upon the express assurance and assertion by the city of Galesburg that the mortgage, and the bonds which the same were given to secure, were a first lien upon the franchise now sought by the bill to be forfeited; and upon the express assertion and assurance by the city of Galesburg that the conditions of said ordinance, and the contract made in pursuance thereof, had in every way been conformed to and fulfilled by the water-works company; and upon the assurance of said city of Galesburg and its solicitors that the water-works company had done all the things required by it to be done in order to acquire full ownership, control, and possession of the water-mains and water-pipes, and the advantages and privileges in said ordinance mentioned.

Assuming, then, as we must for the purposes of this motion, that it may appear upon the hearing of the cause that the city has so far committed itself, to the trustee in this mortgage, and to the holders of the bonds secured thereby, that the water company had fully conformed to and complied with the terms of the ordinance and agreement with the city, as that the city may be estopped from asserting a non-compliance with the terms of said ordinance on the part of Shelton, and the water company, his assignee; and therefore that the holders of the bonds may have another and different answer in this litigation to the original bill from that which could be put in or relied upon by the water company,—it seems to me that we may properly say that the record shows a separable controversy between the Farmers' Loan & Trust Company and the city of Galesburg in regard to the right on the part of the city to have this contract and franchise set aside.

It is objected that the city made its own issue with the water company, and that it does not lie in the power of the Farmers' Loan & Trust Company, the mortgagee of the water company, to intervene in the case and make a new issue; but it seems to me from the showing of the cross-bill, as well as from the petition for removal, that the mortgage of the water-works by the water company was a matter of public record at the time that the city filed its original bill, and that the city was aware of the fact that other persons besides the water company had become interested in the question of setting aside this contract and franchise; and therefore the Farmers' Loan and Trust Company, the mortgagee of the property and of the rights of the water company, was not only a proper but a necessary party to the bill seeking to set aside the franchise; because, even if a decree had been obtained against the water company in the suit as originally planted by the city, such decree would have been inoperative as against the mortgagee, and the city would have been required to litigate the questions over again with this trustee, or those claiming under the mortgage.

It is further objected that the contract between Shelton and the city was between citizens of the state of Illinois, and was not an assignable contract, and therefore a suit cannot be maintained by the assignee of the contract in the federal courts because the water company could not have maintained such suit. It is, however, manifest, from the very terms of the ordinance conferring this franchise, that it was intended to be made assignable, for it runs to Shelton, or his successors or assigns, and grants the privileges thereby conferred to him, his successors or his assigns; and any property rights which have accrued to citizens of other states may be litigated in this court. The city, it seems to me, has also ratified this transfer by bringing the suit against the water company as the holder and present owner of whatever rights were conferred on Shelton by the ordinance; so that it appears to me the question cannot now be made

that the contract was not assignable, so as to defeat the jurisdiction of this court.

The motion to remand is therefore overruled.

WINNEMANS and others v. EDGINGTON and others.

(Circuit Court, N. D. Iowa, E. D. April Term, 1886.)

1. REMOVAL OF CAUSE—JURISDICTION—SEPARABLE CONTROVERSY—REFLEVIN.

W. S. & Co., citizens of Illinois, brought suit in the circuit court of Black Hawk county, Iowa, against S., E., and K., to recover certain goods, or their value, which had been purchased by S. from them, and carried to Iowa. A judgment having been obtained against S. some time afterwards, an execution was issued and placed in the hands of E., the sheriff, one of the defendants, who proceeded to levy the same upon the goods thus purchased. About the same time, also, S. made a bill of sale of the same goods to the defendant K., who took possession of them, and continued in possession of them, the plaintiffs not having given the bond required by law, but choosing to await the result of the suit. The defendant K. was a citizen of the state of Illinois, and the defendants S. and E. were citizens of the state of Iowa. At the appearance term the defendants S., E., and K. united in a petition to remove the cause to the federal court, but no action was taken upon the petition by the state court. A transcript of the record having been filed in this court, the plaintiffs moved to have the cause remanded to the state court. *Held*, that the record does not show a separable controversy between the plaintiffs and the defendants to entitle the defendants to a removal, and that the cause must be remanded to the state court.

2. SAME—AMENDING PETITION.

Where a petition for removal is granted by a state court, and the transcript is filed in the United States court, upon a motion to remand being made, an amendment of the petition will be allowed for the purpose of curing any defects therein. If the state court does not grant or refuses an order for the removal of the cause, no amendments to the petition will be allowed.

At Law. Motion to remand.

Alford & Gates, for plaintiff.

J. Blackburn Jones and Platt & Hoff, for defendants.

SHIRAS, J. This action was commenced in the circuit court of Black Hawk county, under the provisions of the Code of Iowa regulating actions for the recovery of specific personal property. In the petition it is alleged that the defendant Shaw fraudulently induced the plaintiffs to sell him at Chicago a large quantity of goods, which he brought to Waterloo, Iowa, with the intent on his part not to pay for said goods; that upon getting said goods to Waterloo, in furtherance of his fraudulent intent, he procured and caused a judgment in favor of his father-in-law to be entered in Montgomery county, Iowa, the same being a fraud; that an execution was issued thereon, and placed in the hands of the defendant Edgington, who was sheriff of Black Hawk county, who, by direction of the plaintiff in execution, levied said writ upon the goods fraudulently procured from plaintiffs by said Shaw; that said Shaw also, in furtherance of his fraudulent intent, executed a bill of sale to H. W. King upon said goods, and

that said King took possession thereof; and plaintiffs aver that the possession of said goods is wrongfully withheld from them, and prays judgment for the return of the property, or for its value, and damages. Plaintiffs did not file the bond required by section 3329 of the Code of Iowa, and consequently the goods were left in possession of the defendants awaiting the final determination of the suit. At the appearance term in said action the defendants united in a petition for the removal of this cause into the federal court, averring therein that plaintiffs are and were at the commencement of the action, citizens of the state of Illinois; that H. W. King was and is a citizen of Illinois, and Shaw and Edgington are and were citizens of the state of Iowa; that said action sounds in replevin for the recovery of specific personal property, alleged to be by the petitioners fraudulently and wrongfully detained from said plaintiff, etc. It does not appear that any action was taken upon the petition for removal by the state court.

A transcript of the record having been filed in this court, the plaintiff moves for an order remanding the same to the state court. It appears from the averments of the petition for removal that the value of the property in controversy exceeds \$500, and that the defendant King was and is a citizen of the state of Illinois, as are also the plaintiffs. The jurisdiction of this court depends, therefore, upon the question whether the record shows a separable controversy between plaintiffs and the defendants Shaw and Edgington in which the defendant King has no legal interest. According to the averments of the petition for removal the action "sounds in replevin for the recovery of specific personal property, alleged to be by your petitioners (Shaw, Edgington, and King) fraudulently and wrongfully detained from said plaintiffs. The petition in replevin avers that "said sheriff (Edgington) and said King are now in possession of said goods and property of plaintiffs." According to the provisions of the Code of Iowa, the plaintiffs, if successful in the case, are entitled to a judgment for the return of the property, or for its value, and under the averments of the petition plaintiffs' judgment in either form would be against King jointly with Edgington. The record upon its face shows that plaintiffs have sued the defendants jointly, and it does not appear that there is involved a separable controversy in favor of a citizen of Iowa, which would entitle him to a removal.

The ultimate question to be determined is whether plaintiffs have lost the title to the goods in controversy, or whether the title and consequent right of possession still remains in them. In this question the defendants are all interested adversely to plaintiffs, and although in the further progress of the case questions may arise touching the rights of the defendants in which they may not be alike interested, yet, upon the face of the record, it does not appear that the cause presents a separable controversy between citizens of different states. The plaintiffs have sued the defendants jointly, and the case falls

within the rule laid down in *Railroad Co. v. Ide*, 114 U. S. 62; S. C. 5 Sup. Ct. Rep. 735; *Pirie v. Tvedt*, 115 U. S. 41; S. C. 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Andersen*, 6 Sup. Ct. Rep. 730.

Counsel for defendants ask leave to file an amendment to the petition for removal for the purpose of averring that there is a controversy between Shaw and Edgington and plaintiffs, who are citizens of different states. Should leave to file such amendment be granted? If, upon the filing of a petition for removal, the state court grants the prayer of the petition, and the transcript is filed in the United States court; and, upon a motion to remand being made, some defect in the averments of the petition are discovered,—no good reason is perceived why an amendment should not be allowed in order that the averments in the petition may be made to show the very truth of the case. Under such circumstances, the effect of the amendment is to show that the order of the state court was proper, according to the facts. If, however, the state court did not grant or refused an order for the removal of the cause, then a different rule should prevail. The case having been originally brought in the state court, its jurisdiction has attached, and it cannot be compelled, nor in fact is it justified, in parting with jurisdiction, unless the record presented to it shows that the case is properly removable under the law. The right of removal is purely statutory. The state court is in duty bound to retain jurisdiction, unless the party seeking a removal shows upon the record in that court a legal right of removal. If, then, a party seeking a removal does not upon the record make a showing sufficient to terminate the jurisdiction of the state court, and for that reason the state court does not yield up its jurisdiction, can it be permitted to the petitioner to file a transcript in the United States court, and then, in the latter court, file amendments showing that he had a right of removal? The state court is not required to take notice of papers filed or proceedings had in the United States courts.

As already said, the state court must retain jurisdiction, and proceed with the cause, until, upon its record, it is made to appear that the case is one removable to the United States court. Its jurisdiction cannot be affected by papers filed in the United States courts. If a party having in fact the right of removal wishes to exercise the right, he must comply with the statutory requirements. In other words, he must file in the state court a sufficient showing and proper bond. If the showing is incomplete and insufficient, the jurisdiction of the state court continues. If the party by amendment can perfect the showing, he must do so in the state court. He cannot, by filing a transcript in this court, confer the right upon the federal tribunal of terminating the jurisdiction of the state court by allowing an amendment to be filed in this court. *Stone v. South Carolina*, 6 Sup. Ct. Rep. 799.

The motion for leave to file an amendment is therefore refused, and the motion to remand to the state court is granted, the defendants to pay the costs of this court.

EELLS, Trustee, etc., v. JOHANN, Sheriff, etc.¹*(Circuit Court, E. D. Missouri. April 23, 1886.)***RAILROADS—MORTGAGES—ENFORCEMENT OF JUDGMENTS AGAINST MORTGAGED PROPERTY.**

Where a railroad company whose property is mortgaged incurs obligations in the course of its operations, and judgment is recovered against it in a state court, that judgment may be enforced before forfeiture or foreclosure or the appointment of a receiver, by levying upon and selling a portion of the mortgaged property, and a federal court will not restrain its enforcement at the instance of the mortgage creditor.

In Equity. Bill for injunction.
William L. Anderson, for complainant.

TREAT, J., (*orally*.) In this case a bill has been filed on which an application for a provisional injunction is desired. It is an application without notice to the respondent, whereby, prior to a date to be named for the hearing of such a motion, the application should be granted immediately. The bill discloses that on the seventh of May, 1881, judgment was rendered in the state circuit court of St. Charles county, Missouri, against the railway corporation named, in the enforcement of which judgment levy has been made by the sheriff of said St. Charles county upon certain portions of the property of said railway corporation. The trustee of the bondholders asks this court to enjoin the sheriff from proceeding under the judgment and execution in his hands because the property named, which has been seized by said sheriff, is included within the terms of the prior mortgage.

(1) Is this a case where the court should grant an injunction to restrain a state court or its officers? (2) If so, is there anything on the face of the bill requiring the present interference of this court? (3) A larger question underlies this proceeding. A "going concern," to-wit, a railroad, in the course of its operations, though under mortgage, incurs obligations judicially determined to exist. When an attempt is made to enforce said obligations under the ordinary forms of law, shall the judgment creditor not have the right to enforce the same notwithstanding there is a prior outstanding mortgage which covers the property levied upon by the sheriff? So far as can be determined by the bill, the corporation was liable for the judgment had, and the property of the corporation was subject thereto. Is it possible that a judgment creditor who wishes to enforce his judgment against the corporate property shall be restrained from so doing until, without the intermediate appointment of a receiver, the mortgagee forecloses? Of course, a sale by the sheriff under the judgment of the state court will be subject to prior rights; but there is no reason why he should not proceed to sell. It cannot

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

be that because a railroad is bonded that the corporation shall escape liability for its current obligations. While it is a going concern it is operated for the benefit of the bondholders as well as all other parties in interest, and the current obligations thus incurred are to be enforced against the property. The theory of the bill seems to be that none of the obligations, even though judicially determined against the corporation, are enforceable against the property of the corporation because there is an outstanding mortgage which covers such property. This court assents to no such doctrine. Until the mortgage is foreclosed, or proceedings had therefor, the obligations of the corporation, in connection with its operations, are to be enforced prior in right to the unmatured demands of the mortgagees. It therefore appears on the face of the bill that this court should not interfere with the enforcement of the judgment of the state circuit court, and that the due conduct of affairs by said court should not, under the facts stated, be interfered with by this tribunal.

The application is denied, with leave to withdraw the bill.

HOUGH v. BUCHANAN.

(*Circuit Court, N. D. Iowa, C. D. January, 1886.*)

PUBLIC LANDS—RAILROAD LAND GRANTS—SWAMP-LAND ACT—LACHES.

Where, under the act of congress, approved May 15, 1856, granting certain lands to the state of Iowa to aid in the construction of railroads, the lands were selected and claimed as indemnity lands by the state, and the United States had conveyed the title to the railroad company, which became a purchaser for value, such action on the part of the state defeats its right to subsequently claim the same lands under the swamp-land act of 1850; especially where no patent had been issued to the state under the swamp-land act, and where those claiming under said act had, during 25 years, done nothing to perfect the evidence of their title, or to assert any right to the land.

Equity. Bill to quiet title to certain realty.

R. S. Ervin and Theo. Hawley, for complainants.

A. F. Call and Geo. E. Clarke, for defendant.

SHIRAS, J. The bill in this cause is filed for the purpose of quieting in complainants the title to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, of section 11, township 91, range 31 west, situated in Pocahontas county, Iowa. The complainants, who are the widow and heirs at law of John Hough, deceased, claim title under the act of congress approved May 15, 1856, granting certain lands to the state of Iowa to aid in the construction of several lines of railway proposed to be built in said state. The defendant claims the land under the act of congress approved September 28, 1850, and commonly known as the "Swamp-land Act."

The cause has been submitted upon an agreed statement of facts, documentary evidence, and oral testimony. In support of complainants' title the following facts appear: By the act of congress of 1856 there was granted to the state of Iowa, for the purpose of aiding in the construction of certain named lines of railroad, every alternate section of land designated by odd numbers, for six sections in width on each side of the proposed roads; and, to supply the deficiency in the quantity of lands caused by the fact that the United States had already sold or otherwise disposed of some parts of the odd sections within the six-section limit, it was provided that "it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, * * * which lands thus selected * * * shall be held by the state of Iowa for the use and purpose aforesaid."

The general assembly of Iowa, by an act approved July 14, 1856, designated the Dubuque & Pacific Railroad Company as the corporation authorized to construct the line of railway from Dubuque to Sioux City, and to receive the lands granted in aid of the building of said line, and that company accepted the grant thus made, and entered upon the construction of the road. In the agreed statement of facts it is admitted that the line of said railway was located through Pocahontas county on or before September 30, 1856; that the railroad company had earned the quantity of lands certified to it; and that an agent appointed by the governor of the state selected the lands in controversy as part of the indemnity lands to which the company was entitled under the grant of May, 1856. By a certified copy of the records of the land-office at Washington it is shown that the lands in controversy, with others, were, on the twenty-third of December, 1858, certified by the commissioner of the general land-office as a correct list of the tracts of land selected by the agent of the state of Iowa to make up the deficiency within the six-mile limit; and this list was, on the twenty-seventh of December, 1858, duly approved by the secretary of the interior, subject to the conditions of the act of May 15, 1856, and to any valid interfering rights to any of the tracts embraced in said list. In the agreed statement of facts it is stipulated "that John Hough was, at the time of his death, the owner of all the title ever acquired by the said railroad company," and the evidence shows that the complainants have succeeded to the rights and title of said John Hough. It also appears that complainants, and those under whom they claim, have paid the taxes levied on said lands since the year 1865. By the provisions of section 2449 of the Revised Statutes the certification of the lands as above described has the effect of a conveyance in fee-simple, and conveys as perfect a title as though a patent had been executed thereto. *Fraser v.*

O'Connor, 115 U. S. 102; S. C. 5 Sup. Ct. Rep. 1141. It thus appears that complainants' chain of title from the government is complete, and unless the defendant can show a superior or better right, complainants are entitled to the relief sought by their bill.

As already stated, defendant bases his claim to the realty upon the provisions of the swamp-land act of 1850. In the agreed statement of facts it is stipulated that Pocahontas county was organized as a county in 1859, and in the same year duly and legally selected the lands in question as part of the swamp lands granted to the state by the act of congress of 1850; that such selection was duly forwarded and filed as provided by law; that the interior department has never passed on the question of fact as to whether the lands were in fact wet and swampy, but has decided, as a matter of law, that they passed to the railroad company; that said lands have always been wild and uncultivated; that the defendant owns all the title that the state ever acquired to the lands under the swamp-land act; and that the evidences of his title have been of record in Pocahontas county since 1870. In the answer of defendant it is averred that the lands passed to the state under the swamp-land act; from the state to Pocahontas county under the several acts passed by the legislature touching the disposition of swamp lands; from the county by deed to John M. Stockdale; and, by two intermediate conveyances, from Stockdale to defendant.

By an act passed January 13, 1853, the legislature of Iowa granted the swamp lands to the counties in which they were situated, and by an act passed January 25, 1855, the legislature provided that "no swamp or overflowed lands granted to the state, and situate in the then unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the state;" whereupon the titles to said lands shall be transferred to the counties upon payment by the latter of the expenses incurred by the state in selecting said lands. It is not shown that the title to the lands in question has ever been perfected in the state under the swamp-land act; that is to say, it does not appear that any patent has been issued therefor to the state as contemplated by the swamp-land act. It thus appears that the state of Iowa, by the provisions of the swamp-land act, became entitled to all the lands belonging to the United States within the borders of the state which were swamp or overflowed, and had the power to perfect its title thereto by causing the proper selections to be made and certified to the department, and procuring a patent therefor; the state being charged with the trust or duty of applying the proceeds realized therefrom to the drainage and reclaiming of the said lands, so far as necessary.

By the railroad land-grant act of 1856, the state became entitled to the alternate sections within six miles of certain proposed lines of railway, with the right to select, within a limit of fifteen miles, lands to make up any deficiency within the six-mile limit caused by

a previous disposition of the lands by the United States. The state, through its agent lawfully appointed, selected the lands in controversy in 1858, as part of the indemnity lands to which the Dubuque & Pacific Railroad Company was entitled, and the same were duly certified by the secretary of the interior, thus, in effect, patenting them to the railroad company by order and direction of the state. When this was done, to-wit, in 1858, Pocahontas county was not organized, nor had it acquired any vested right in the swamp lands within its borders. It was not a purchaser for value, and the state could, by legislative enactment, have changed the disposition of the lands at any time before the organization of the county and the completion of the title therein. When, therefore, the lands were selected by the state, and claimed as indemnity lands under the railway grant, and the United States had conveyed the same to the railroad company, did not such action on part of the state defeat its right to subsequently claim the lands under the swamp-land grant? The railroad company was a purchaser for value, in that it had agreed, in consideration of receiving the quantity of lands specified in the act of 1856, to construct the line of railway from Dubuque to Sioux City. After procuring the conveyance of these lands to the railroad company it would be most unjust to permit the state to assert a right to the same lands under the swamp-land act. True, the certificate executed by the commissioner, and approved by the secretary of the interior, provides that the lands are certified subject to any valid interfering rights, but that restriction cannot be held to be a reservation in favor of the state of Iowa, under the facts of this case. Under the act of 1856, and the acts of the legislature of Iowa, the railroad company, through the state, was entitled to demand and receive from lands within the fifteen-mile limit sufficient to make good the deficiency within the six-mile limit. The lands in controversy are within the fifteen-mile limit. The duty of making the selection of the indemnity lands is left with the state, and the agent appointed by the governor selects the lands in question, and the same are certified to the railroad company.

If, under these circumstances, it should now be held that the state is not debarred from asserting a claim to these lands under the swamp-land act, it is clear that a fraud would thereby be perpetrated upon the company and its grantees. Should it, however, be held that it was open to the state, or its grantees, to contest the validity of the transfer to the railway company, such contest must certainly be made within a reasonable time. The county, upon its organization in 1859, caused these lands to be listed as swamp lands, and the list was forwarded through the proper channels to the department at Washington. The commissioner refused to certify the lands under the swamp-land act, holding, as a matter of law, that the certification made thereof in 1858 to the railway company defeated the right to claim them under the swamp-land act. It does not appear that

the county or its grantees have since taken any further action in the premises. They knew that the lands had been certified to the railway company in 1858; that the commissioner of the land-office had refused to certify the lands under the swamp-land act; that the railway company and its grantees were claiming the land, and asserting title thereto by paying the taxes assessed thereon; and yet, for 25 years, the defendant and his grantors have done nothing to perfect the evidence of their title, or to assert any right to the land. Certainly, their claim must be regarded as stale, and not entitled to favorable consideration at this late day.

If, however, it is still open to defendant to make claim to the lands under the swamp-land act, it is certainly incumbent upon him to clearly establish the fact that these lands were, in 1850, of the character intended to be conveyed by that act. The defendant is, in effect, asking the court to reverse the action of the land and interior departments of the government in conveying these lands to the railway company, after a lapse of over a quarter of a century, basing his claim upon the allegation that these lands were in fact, in 1850, swamp or overflowed lands. Most clearly, the burden is upon defendant of establishing this allegation of fact, constituting, as it does, the sole foundation of his claim, by satisfactory and convincing evidence. *Buena Vista Co. v. Railroad Co.*, 112 U. S. 165; S. C. 5 Sup. Ct. Rep. 84. It cannot be expected that a title based upon a patent from the government, or its equivalent, which has stood unimpeached for so many years, can be successfully questioned, except upon most clear and cogent evidence.

In support of the allegation that the lands in controversy were swampy, and therefore included within the act of 1850, the defendant has introduced the testimony of three witnesses. Their testimony, however, applies only to two of the 40-acre tracts in controversy. As to the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 11 there is no testimony whatever. Touching the other quarter sections the evidence adduced by defendant's witnesses, standing alone, is sufficient to justify the finding that these pieces are wet, swampy, and overflowed in parts, and to an extent sufficient to bring them within the terms of the act of 1850. In rebuttal, however, the complainants have also introduced three witnesses, who testify to the nature of the land, and, according to their testimony, while there are some wet places upon these forties, yet the greater part thereof is susceptible of cultivation without being drained. In other words, the testimony of complainants' witnesses upon this subject, standing alone, is sufficient to show that these lands are not of the character of lands described in the act of 1850. The witnesses on both sides seem to be equally disinterested, to have had substantially equal means of knowledge of the character of the lands, and their testimony leads to exactly opposite conclusions upon the point at issue. The court is not justified in disregarding the evidence of complainants' witnesses on this question, and the evidence,

therefore, being, at the best, evenly balanced upon this point, it follows that defendant has failed to show, by a fair preponderance of evidence, even if that was sufficient, that these lands were, in 1850, of such a character as to bring them within the description of lands intended to be conveyed by the swamp-land act. Complainants are therefore entitled to a decree as prayed for.

GRIGGS v. ST. CROIX Co. and others.

(Circuit Court, W. D. Wisconsin. October 21, 1885.)

TAXATION—COLLECTION—INJUNCTION—SCHOOL AND HIGHWAY TAX—REV. ST. WIS § 776.

Under section 776 of the Revised Statutes of Wisconsin the aggregate amount of taxes voted by the electors of a town for schools and highway purposes (though a specific portion of the same is to be levied and applied for the benefit of each school and road district of the town) may be assessed and levied upon the property of the tax-payers of the town; and where an action is brought to restrain the sale of land upon which the same are levied for its portion of the tax, it is no objection to the validity of the tax that the districts in which the land is located are not composed of contiguous territory, and that the specific amount of tax to be raised for each district is not assessed and levied upon the property of the tax-payers of the districts severally.

Bill in equity to restrain the sale of plaintiff's lands for the collection of state, county, town, school-district, and highway taxes assessed thereon in 1882. Upon hearing upon bill, answer, and proofs, at the June term, 1884, the assessment was set aside and a reassessment ordered. The previous opinion of the court herein is reported in 20 Fed. Rep. 341. Upon the completion of the reassessment, plaintiff, under chapter 128, Laws Wis. 1881, filed a large number of objections thereto, and against the legality of the taxes reassessed and relieved upon said lands. Those relied upon at the hearing were the following, to-wit: (1) That the school-district taxes upon plaintiff's lands in school-districts Nos. 1 and 3, in the town of Emerald, were illegal and void because said districts were not composed of contiguous territory, as required by section 412, Rev. St. Wis. Plaintiff's lands were situated in said town of Emerald, in said St. Croix county, which town was composed of two government townships, viz., township 30, range 15 W., and township 30, range 16 W. Township 30, range 15, was mostly wild and uncultivated, while township 30, range 16, was quite well settled. Said town was originally divided into three school-districts,—Nos. 1, 2, and 3. The school-house, and principal part of the territory, of No. 1 was in township 30, range 16. June 15, 1882, the town board of supervisors, by an order of that date, annexed sections 31, 32, 33, and W. $\frac{1}{2}$ of section 34, in township 30, range 15, to said district No. 1; but this last-mentioned ter-

ritory was more than a mile from the rest of the district, in township 30, range 16; hence was not contiguous thereto. District No. 3, down to August 21, 1881, was composed of two tiers of sections, extending entirely across the north side of said town, and hence was 12 miles long and 2 wide, and embraced 24 sections. On August 21, 1881, said board formed a new school-district from No. 3 by taking from the center thereof 12 sections, and thus forming a district six miles long by two wide. By the formation of this new district, No. 3 was cut in two, leaving six sections thereof upon the east side of this new district and six upon the west, so that said remaining portions of No. 3 were widely separated; but the portion upon the east of this new district was wilderness. The school-house was in the portion upon the west. All of plaintiff's lands were in township 30, range 15, and a portion thereof in the non-contiguous territory of said districts Nos. 1 and 3, in said township. (2) That the highway taxes upon plaintiff's lands in road-districts Nos. 1, 3, and 7 were illegal and void because said districts were not composed of contiguous territory. Said districts, at the time of the levying of the highway taxes in 1882, and the relevying of the same in 1884, were composed of non-contiguous territory, a portion of each being in township 30, range 16, and a portion in township 30, range 15; said portions being separated by the intervening territory of other road-districts. Defendants contended that the fact that said school and road districts were not composed of contiguous territory did not render the school and highway taxes therein unequal or unjust, and that the legality of said districts could not be assailed in this action. Said town, at its annual town meeting in 1882, voted to levy a tax of \$100 for each road-district, making \$800 for the eight road-districts into which said town was divided. Said \$800 was relevied and extended by the town clerk upon the reassessment roll, upon the valuations as of the year 1882 therein contained, and was placed in the column with the state, county, and other town taxes of that year. Plaintiff objected that said \$800 was a highway tax, and should have been assessed by the town board of supervisors, under sections 1239, 1240, Rev. St. Wis., upon the valuations of 1881 in each district, instead of upon the valuations of 1882 upon the entire town; and that therefore they were illegal and void; and having been indistinguishably mingled with the state, county, and town taxes, the whole was thereby rendered void.

Baker & Smith and J. C. Spooner, for plaintiff.

R. H. Start and L. P. Wetherby, for defendants.

BUNN, J. The objection to the reassessment of the tax of most force seems to be that the \$800 of road tax which was voted by the electors at the annual town meeting of 1882, and placed in with the other town taxes, and levied upon the property of the whole town, upon the tax roll of that year, should have been levied upon the roll

of the preceding year, and raised, not upon the property of the town generally, but \$100 in each of the eight road-districts of the town, and carried out in a separate column. If the objection is good at all, it will be fatal to the assessment, as it is impracticable to separate what is legal from what is illegal. But, upon consideration, I think the objection not tenable. The authority under which the \$800 road tax was voted is contained in section 776, Rev. St. Wis., which gives power to the qualified voters of each town, at the annual town meeting, to vote to raise money for the repair and building of roads and bridges, or either.

In the town of Emerald, which consisted of eight road districts, the electors, at the annual town meeting, voted to raise "*one hundred dollars levied for each road-district,—\$800.*" This is the record in evidence. It is contended that the effect of this vote was to levy \$100 upon the property of each road district, though it is conceded by plaintiff in his brief that the electors usually vote for highway taxes a certain number of mills upon the dollar, and the supervisors also add a mill tax, and that this would, of course, make a uniform percentage for the entire town; and it seems quite clear to the court that such a course would have been a compliance with the statute. But is not what the electors did, in substance, the same thing? The statute, in terms, does not confine the vote to a mill tax, and I see no reason why the electors could not have voted to raise \$800 on the town, to be laid out, \$100 in each road-district, or as the town board might see fit to expend it, upon the highways of the town. It seems as though this is what the statute contemplated, rather than to give the electors power to raise certain sums separately upon the property in each road-district. The same language which gives power to raise money for roads applies also to bridges, the taxes for which, I believe, are always levied upon the town generally. Possibly, under the statute, the electors might raise different sums for each road-district, to be levied and raised upon the property of the several districts; but I would not think that is what the statute means, and I do not understand such to be the effect of the vote taken in this case. Voting \$100 for each road-district, making an aggregate of \$800 in the town, does not necessarily mean that the \$100 is to be levied upon the property of the road-district; and if the town authorities were justified in levying the \$800 upon the property of the town, the fact that the road tax is not carried out in separate columns cannot affect the validity of the tax, as no one is injured in any way by it.

I think, also, there was no error in levying the assessment of the highway tax upon the new valuation. This seems to me evident from chapter 128, Sess. Laws Wis. 1881, governing proceedings of this sort. In regard to the defendant's claim, that 12 per cent. interest should be allowed from January 1, 1883, I think the provisions he cites do not apply to a case like this, where a reassessment has been ordered upon the original tax being held illegal.

I think the plaintiff's objections to the reassessment should be overruled, and that an order should be made in accordance with the provision of chapter 128, Laws Wis. 1881, requiring the plaintiff to pay into court, for the use and benefit of the defendants, the amount of the tax assessed upon his lands according to the reassessment tax roll, which I believe is \$1,839.96, or \$70.20 less than the original assessment, which was \$1,910.16; and that upon complying with such order of the court a judgment be entered against the defendants, with costs.

The order may be entered *nunc pro tunc* as of the June term, when the cause was heard.

FUNK, Adm'r, v. ANGLO-AMERICAN INS. Co.¹

(Circuit Court, E. D. Missouri. April 22, 1886.)

CORPORATION—SERVICE OF PROCESS ON FOREIGN FIRE INSURANCE COMPANIES UNDER MISSOURI STATUTES.

Where a foreign fire insurance company does business in Missouri through an agent, without complying with the requirements of the Revised Statutes of that state as to the appointment of an agent to receive service of process, process may be served in suits against it upon the agent through whom it transacted its business.

At Law. Suit upon a fire insurance policy.

The summons was served upon William A. Noyes, as agent of the defendant, which is a foreign company. The defendant filed an answer containing a general denial, and stating that said Noyes has never had any authority to accept service of any legal process on it, and that there is no agent or person representing it in this state who has authority to accept service. The Revised Statutes of Missouri provide (§ 3489) that "a summons shall be executed, * * * where defendant is a corporation or joint-stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent, or employe in any county where such service may be obtained." Said statutes also provide (§ 6013) that "any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state, shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing some person, who shall be a resident of this state, to acknowledge or receive service of process,

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

and upon whom process may be served for and in behalf of such company in all proceedings that may be instituted against said company in any other court of this state, or in any court of the United States in this state; and consenting that service of process upon any agent or attorney appointed under the provisions of this section should be taken and held to be as valid as if served upon the company, according to the laws of this or any other state; and such instrument shall furthermore provide that such attorney's authority shall continue until revocation of his appointment is made by such company by filing a similar instrument with said superintendent, whereby another person shall be appointed as such attorney."

George M. Stewart, for plaintiff.

J. L. & F. P. Blair, for defendant.

TREAT, J., (*orally*.) The amount of loss was in excess of the sum insured. The proofs of the loss were duly made, whereby the amount of the policy, to-wit, \$1,100, was payable October 1, 1885. Hence, the only inquiry is as to the sufficiency of the service on the agent Noyes whereby the defendant could be bound. As heretofore held by this court, the contract of insurance was made in this district by said Noyes, as agent of the defendant, and consequently said agent under the rules of law still remained such agent for the purposes of service, unless, possibly, due notice had been given to the plaintiff that he had ceased to be said agent. Where contracts by a foreign insurance company are made in a state without regard to its legal requirements, the company should not be permitted to escape from its liabilities through its non-compliance with the statutory laws of said state. It appears that this policy was formally delivered and premiums collected thereon by the company's agent, W. A. Noyes, within this district; that service in this case was had on said agent Noyes; therefore neither a motion to quash nor a plea in abatement as to service could prevail. The defendant company delivered the contract and collected the premium thereon through its said agent within this jurisdiction, and it must be held that he continued to be the agent of this company for all the purposes of said contract until the final determination thereof, unless something to the contrary is shown. The fact that he invaded the territorial jurisdiction of Missouri without compliance with its statutory demands cannot excuse him or the company he represented from the obligations of the contract. Were this otherwise, a party would be permitted to take advantage of its own violations of the law to escape its rightful obligations.

Judgment for plaintiff for the sum of \$1,100, with interest at 6 per cent. per annum from October 1, 1885, to date, to-wit, \$1,136.85.

WOODWARD v. GOULD.¹*(Circuit Court, E. D. Missouri. April 21, 1886.)***ASSUMPSIT—PLEADINGS—CONTRACTS.**

In a suit for breach of a contract the complete performance of which has been abandoned by the plaintiff because of the defendant's refusal to proceed, the petition should show that some thing is due the plaintiff on account of what he did before such refusal and abandonment.

At Law.

Krum & Jonas, for plaintiff.

Bennett Pike, for defendant.

TREAT, J., (*orally*.) When this case was presented to the court on the demurrer to the first amended petition an order was made that the then amended petition should be made more definite. The second amended petition is now to be considered under a demurrer filed. The said second amended petition is, to a large extent, quite as vague and indefinite as the former amended petition, yet the demurrer must rest on the allegations as now presented. Applying the ordinary rules pertaining to pleadings, it seems that there was an arrangement between plaintiff and defendant for the organization of a corporation the benefits of which, when organized, were to be divided between the respective parties on the terms stated, the defendant paying certain preliminary costs and expenses. The petition avers that the plaintiff, on whom the duty devolved, had done some work looking to the organization of the proposed corporation, which corporation never was organized. The petition also avers that certain expenses for the survey and location of the proposed railroad had been incurred. It nowhere avers that said expenses had not been paid by the defendant. It does aver that while the plaintiff was ready and willing to perform the agreement on his part, the defendant refused to proceed further under said agreement. What, under such statement, would be the cause of action? Damages actually incurred by such breach, but not prospective or speculative damages. Nothing appears in the petition to show non-payment by the defendant of all costs and expenses incurred prior to the abandonment of the enterprise. On the face of the petition it appears that the plaintiff did not complete the organization of the corporation as agreed, nor that the expenses for preliminary work had not been fully paid by defendant. Therefore, despite the general allegation in the petition that the plaintiff had performed all that was required of him to be performed, the specific allegation shows that he did not so do. The legal consequence is that a contemplated enterprise having been abandoned, neither party proceeding therewith, the sole right of recovery under the most favor-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

able circumstances would be a reimbursement to plaintiff of expenses incurred and unpaid by the defendant for which he was liable. In this latter respect the petition is devoid of essential allegations to make a cause of action.

Demurrer sustained.

CLARK v. HAMMETT.

(Circuit Court, D. Kansas. April, 1886.)

WRIT AND PROCESS—SERVICE BY PUBLICATION—SUIT TO QUIET TITLE—SUBSEQUENT EJECTMENT.

A decree in a suit to quiet title in the circuit court against a defendant who is a citizen of another state, rendered on service of summons by publication, will not bar a subsequent action of ejectment by the defendant to recover the land involved.

At Law.

J. G. Slonecker, for plaintiff.

Fabius M. Clarke, for defendant.

FOSTER, J. Action in ejectment by the plaintiff to recover certain real estate situate in Marshall county, Kansas. Defendant pleads in bar a decree of this court in the case of Charles L. Flint against David M. Clark, said plaintiff, and others, quieting the title of said Flint to the land in controversy, and decreeing Clark's title invalid, and barring him from asserting the same; that said defendant holds title to the land under said Flint, etc. To this plea the plaintiff files a general demurrer.

It appears from the record of *Flint v. Clark* that Flint held a tax deed on the land, and that he filed a bill in equity against said Clark and others to quiet his title, and to bar them from asserting any claim to the land. In his bill, after setting out his tax deed, he avers "that each of the said defendants claims some title, estate, interest in, or some lien or claim upon, the lands, by patent from the United States, or through grantors under such patents; and claiming that there are errors and irregularities connected with the issue of said tax deeds which render the same voidable. * * * And plaintiff avers that the said estate of the defendants was divested by the said tax deeds, and the said claims and pretenses are unjust, inequitable, and unfounded, and tend to the manifest injury of the plaintiff, and to disturb him in the enjoyment of his said estate, and to prevent an advantageous sale thereof." He therefore prays that his title may be established and quieted, and that defendants, and all persons claiming under them, be forever barred from asserting title, etc. Clark was and is a citizen of Massachusetts, and service of process was made on him by publication in a newspaper, under the act of congress of March 3, 1875. He made no appearance, and a decree was entered

as prayed for. This question goes to the jurisdiction of the court to make such decree on service by publication.

Ths statutes of Kansas authorize such a suit and such service. St. 1879, Code, § 72, p. 594. The act of congress of March 3, 1875, authorizes such service in suits pending in this court to remove any incumbrance or lien or cloud upon the title to real or personal property within the district, when one or more of the defendants shall not be an inhabitant of, or found within, the district, etc. It will be observed that this act does not, in terms, authorize such service in suits to quiet title, but it is difficult to perceive wherein such a suit is not as much a proceeding *in rem* as a suit to remove a cloud. On the other hand, I think it must be conceded that if a suit to remove a cloud is a proceeding *in personam*, a suit to quiet title must be held as coming under that class. The supreme court has decided that a suit to quiet title, in a case like *Flint v. Clark*, under a statute of a state, is maintainable on the equity side of this court when the defendant is in court. *Holland v. Challen*, 110 U. S. 15; S. C. 3 Sup. Ct. Rep. 495; *Reynolds v. Bank*, 112 U. S. 405; S. C. 5 Sup. Ct. Rep. 213. It is unnecessary to cite authorities to sustain the rule of law that no personal judgment can be rendered against a party unless he has been served with process or makes voluntary appearance, nor is it necessary to cite authorities to the other rule that an adjudication *in rem* can be made when the court has obtained jurisdiction of the *res* without personal service of process on the person. It would follow that if the suit by Flint to quiet his title was a proceeding *in personam*, and not *in rem*, the decree of the court, so far as it sought to adjudicate and bar Clark's title to the land, was *coram non judice*, and void. The supreme court of the United States has declared that a suit to remove a cloud from the title to real estate is a proceeding *in personam*, (*Hart v. Sansom*, 110 U. S. 151, S. C. 3 Sup. Ct. Rep. 586,) and that jurisdiction of the person is necessary to making the decree.

As before stated, if a suit to remove a cloud is a personal action, I think it must be conceded that a suit to quiet title is likewise. There is no seizure or taking of the property by the court, nor any decree for its sale, or for any act or thing to be done in regard to the thing itself, which is required to make it a proceeding *in rem*. *Pennoyer v. Neff*, 95 U. S. 714; *Webster v. Reid*, 11 How. 437. The proceeding appears to be directed against the person. It is true it does not seek to compel him to execute a release of his pretended title, but rather seeks to enjoin and bar him, and all persons claiming under him, from asserting any title or interest in the land. In *Hart v. Sansom*, *supra*, the court say:

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. * * * It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title."

The court further say it would doubtless be within the power of the state in which the land lies to provide that the court might appoint a trustee to execute or cancel a deed on behalf of a defendant not found within the jurisdiction of the court. *Massie v. Watts*, 6 Cranch, 148; *Orton v. Smith*, 18 How. 263; *Webster v. Reid*, *supra*.

Believing, as I do, that the supreme court has established the rule of law applicable to this case, it is not necessary for me to discuss it as an original proposition, or to refer to the general views presented by defendant's counsel, or by Mr. Justice HUNT in his dissenting opinion in *Pennoyer v. Neff*, however much of reason they might present to my mind if the question was not *stare decisis*.

The plaintiff's demurrer must be sustained; and it is so ordered, with leave to defendant to answer.

UNITED STATES v. MORRIS, Ex'r.¹

(District Court, E. D. Pennsylvania. 1886.)

TAXATION—LEGACY TAX—ACT OF CONGRESS OF JUNE 30, 1864.

When a testator has abandoned his residence in this country, the legacies provided for by his will are not subject to the legacy tax provided for by the act of congress of June 30, 1864. *U. S. v. Hannevell*, 13 Fed. Rep. 617, followed.

Trespass on the case.

The jury found:

(1) Prior to the year 1866 the defendant's testator, Hartman Kuhn, was a citizen of the United States, and resided in the city of Philadelphia, in the state of Pennsylvania.

(2) In May, 1866, he abandoned his residence in Philadelphia, and went with his family to live in Europe, with the intention of permanently residing abroad.

(3) On January 23, 1870, the said Hartman Kuhn died at Rome, Italy, where he was domiciled at the time of his death.

(4) By his will the said Hartman Kuhn bequeathed one-third of his personal property absolutely to his wife, and the remaining two-thirds thereof to three trustees, in trust for his son, and of his said will the testator appointed his wife to be executrix and his brother and the defendant to be executors. The latter alone resided in the United States, and to him alone letters testamentary were, on the twenty-first day of February, 1870, granted by the register of wills for the county of Philadelphia aforesaid.

(5) The total net amount of the personal property of the said testator in the state of Pennsylvania which came into the hands of the defendant as executor was \$110,256.80.

(6) On the fourteenth of March, 1871, the executor filed his final account in the office of the register of wills for the county of Philadelphia, which was duly audited and confirmed by the orphans' court of the said county, and the

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

balance of the personal property thereupon distributed to the legatee under the will.

(7) The succession tax due the United States was paid by the trustees in September, 1871, but the legacy tax on the personal property was not paid.

(8) The defendant in not paying the legacy tax acted under the advice of counsel, who so advised; and prior to such advice the commissioner of internal revenue had decided that "unless a testator who dies in a foreign country has a residence in the United States his legatees in this country are not subject to the legacy tax." The facts contained in this paragraph were communicated in 1871 to the collector of internal revenue of this district.

(9) The writ in this case issued October 3, 1879.

If upon the above facts the court shall be of opinion that the defendant is liable for the legacy tax upon the personal property of the said Hartman Kuhn, deceased, then the jury find for the plaintiff, and assess the damages at \$735.04. If upon the above facts the court shall be of the opinion that the defendant is liable, not only to the said legacy tax, but also for the penalty for previous non-payment thereof, then the jury find for the plaintiff, and assess the damages at \$1,087.84. If upon the above facts the court shall be of the opinion that the defendant is not liable for the said legacy tax, then the jury find for the defendant.

John K. Valentine, for the United States.

William H. Rawle, for defendant.

BUTLER, J. Under the facts stated in the special verdict the defendant is entitled to judgment. The testator having abandoned his residence in this country, and removed to Europe,—where he died,—the legacies provided for by his will are not affected by the act of congress of June 30, 1864. The case cannot be distinguished from *U. S. v. Hannewell*, 13 Fed. Rep. 617.

The clerk is therefore directed to enter judgment for the defendant.

ROBBINS v. LINCOLN.

(Circuit Court, N. D. Illinois. April, 1886.)

WRIT AND PROCESS—EXEMPTION OF ATTORNEY FROM ANOTHER STATE ATTENDING COURT—REV. ST. ILL. CH. 13, § 9.

Under the Illinois statute a resident attorney may be served with summons in a civil action or suit while in attendance upon the courts, and an attorney from another state has no greater privilege.

At Law.

Trumbull, Washburn & Robbins, for complainant.

John Woodbridge, for defendant.

BLODGETT, J., (orally.) This is a motion to quash the service of summons on the defendant, Timothy D. Lincoln, the ground for the motion being that Mr. Lincoln, who is a resident of the city of Cincinnati and an attorney at law, came into this district for the purpose

of attending to the trial of a cause pending before this court in which he was counsel and solicitor, and while here was served with the ordinary chancery subpoena or summons requiring him to appear and answer the complainant's bill at a future day. In resisting this motion, one of the points made by the complainant is that Mr. Lincoln is not a member of the bar of this court. This point is not well taken, it being personally known to myself, and would undoubtedly be established by the records of this court, but for the fact they were destroyed by the fire of 1871, that Mr. Lincoln, as early as 1856, was admitted as an attorney in this court, and appeared in a series of very important cases then pending here. Further than that, the supreme court of the United States has held that a member of the bar of the supreme court is entitled to practice in any of the federal courts, and Mr. Lincoln has for many years past, as the reported cases show, appeared as attorney in cases before the supreme court of the United States.

The question raised by this motion involves the construction to be given the Illinois statute in regard to the privilege of attorneys and officers of courts. I do not see that a member of the bar from neighboring states is entitled to any greater privilege than a member of the bar of our own state as to service of process upon him while in the exercise of his professional functions. Section 9, c. 13, Rev. St. Ill., provides:

"All attorneys and counselors at law, judges, clerks, sheriffs, and all other officers of the several courts within this state, shall be liable to be arrested and held to bail, and shall be subject to the same legal process, and may in all respects be prosecuted and proceeded against in the same court, and in the same manner, as other persons, any law, usage, or custom to the contrary notwithstanding: provided, nevertheless, said judges, counselors, or attorneys, clerks, sheriffs, or other officers of the several courts, shall be privileged from arrest while they are attending court, and while going to and returning from court."

This statute has never been passed upon by the supreme court of this state, and I am compelled to give it such construction as it seems to me the legislature of the state intended. The word "arrest," as used in connection with the privilege of members of congress, officers of courts, witnesses, etc., has been construed by many of the courts, and several of the federal courts, to include the service of summons; so that there is a line of decisions running through the state and federal reports holding that service of summons on a party is equivalent to an arrest, and that the privilege from arrest is violated by the service of a summons. The statute of Illinois, however, I think, clearly implies by the word "arrest" a detention of the person within the technical and legal meaning of the word in contradistinction to mere service of summons, because the first paragraph of the section which I have just read, after enumerating the persons, says, "Shall be liable to be arrested, and held to bail," thereby implying something more than service of summons on them which shall require their at-

tendance at a future day; and although the proviso of the statute under which these persons are privileged when in attendance upon the courts uses the word "arrest," yet, at the same time, it is very evident that the word as used in the proviso relates back to the use of the same word in the body of the section; so that I have no doubt the legislature of Illinois intended that the privilege should be only from being arrested and held to bail.

The evident purpose and meaning of the Illinois statute, when all considered together, is, as it seems to me, to privilege an attorney from actual arrest while in attendance upon the courts where he has professional duties to perform; as, if arrested at such time and imprisoned, or obliged to seek bail, the rights of his client may be jeopardized, and the business of the court interrupted or delayed; but it only privileges him from such service of process as involves imprisonment or holding to bail.

I do not intend in deciding this motion to be understood as dissenting from the cases where it has been held that a person coming into the district as a witness is privileged from being served by summons, nor the cases where a party has been induced by some false or fraudulent pretense to come within the territorial jurisdiction of a court, and then served with summons, as these cases, it seems to me, rest upon a different principle. I only intend to decide that, as I construe the Illinois statute, a resident attorney may be served with summons while in attendance upon the courts here, and that an attorney from another district or state has no greater privilege.

The federal statute allows a civil suit to be brought against a person in the district whereof he is an inhabitant, or in which he may be found at the time of serving process; and as the return in this case shows that this defendant was found in this district, and served with process of summons therein, I think the plea or suggestion of privilege is not well taken.

SOUTHERN DEVELOPMENT CO. *v.* HOUSTON & T. C. RY. CO. and others.¹

(Circuit Court, E. D. Texas. March 15, 1886.)

1. BANKS AND BANKING—DEPOSITS—COURT FUNDS—MONEYS PAID INTO COURT.

Where, by the orders appointing them, receivers were authorized and directed to carry on and operate railways, and the property thereof, and such carrying on and operating contemplated and required the handling, receiving, and paying out of moneys, the payment and collection of bills, and the transaction of such financial business as would require the medium and accommodation of banks, *held*, that in the transaction of this business, such moneys so deposited in such banks were not deposited as special funds, to be drawn out on or-

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

der of the court, but were deposited generally, to the credit of the receivers, and to be handled and used by the bank like deposits of its other patrons in a banking, loan, and deposit business.¹

2. SAME—CONTEMPT OF OFFICER OF COURT.

If it be conceded that a bank, designated by the court as a bank of deposit, etc., of funds coming into the hands of receivers appointed by the court, by designation of the court, and by acceptance, become an officer of the court, and that the funds deposited therein were court funds, and that therefore the bank is liable for misconduct in misappropriating such funds, as in case of contempt, there is neither reason nor authority for considering that each servant or agent of the bank also become *pro hac vice* an officer of the court, and therefore amenable to the court, as in case of contempt, for misconduct in dealing with bank funds. *In re Western Marine & Fire Ins. Co.*, 88 Ill. 289, distinguished.

On Rule for Contempt against William R. Baker and others.

E. H. Farrar, for receivers.

I. C. Hutcheson, and *George Goldthwaite*, for respondents.

PARDEE, J. The petition of the joint receivers in this case sets forth that the court in this case made an order naming and constituting certain banks in the city of Houston depositories, and requiring petitioners to deposit in said banks, for safe-keeping, the moneys which might come to their hands as receivers of the defendant corporation, the same to be kept solely for safe-keeping, and to be subject to the order of petitioners; that the City Bank of Houston, a banking corporation under the laws of Texas, was one of the banks constituted a depository aforesaid; that said bank accepted the trust, and received deposits from petitioners almost daily from said appointment up to and inclusive of the nineteenth of December, 1885; that William R. Baker is, and has been for months past, the president of said bank; that Benjamin F. Weems is, and has been for years, cashier of said bank, and a director thereof; that S. K. McIlhenny and Robert Brewster are, and have been for several years, directors of said bank; that while occupying said positions of trust in connection with said bank said Baker, Weems, Brewster, and McIlhenny did fraudulently combine and conspire together, and with other members of the board of directors, to obtain possession of all such deposits as might be made by the receivers, for their own use and for the use of the bank and its creditors, and to oust the jurisdiction of this court, and to put the said receivers' funds beyond the control of the court; that the appointment of said Weems as receiver of said bank was procured by the respondents to be made by the judge of the Eleventh district court of the state of Texas; and that the said Weems, acting under color of such appointment, has taken possession of the greater part of the assets of said bank, including the funds belonging to said receivers. They further aver, in support of these charges, in substance, that the said bank was, and had been for some months previous to its failure, in an involved and insolvent condition, to the

¹ See note at end of case.

knowledge of its officers, particularly to the knowledge of the respondents; and that thereupon, the said bank being the owner of large quantities of real estate, which formed the basis of its credit, the said respondents Baker and Weems, for said bank, executed, about the twentieth day of November, 1885, deeds of trust for the use of respondents Baker, Brewster, and McIlhenny, conveying nearly all the valuable real estate of said bank to secure alleged debts to said respondents; that said deeds of trust were kept secret, and not recorded until the seventeenth and nineteenth days of December, just prior to filing petition in the state court for the appointment of a receiver; that at the time said deeds were executed said Baker and Weems well knew that the said bank was absolutely insolvent; that said deeds were executed in anticipation of the declaration of such insolvency, and with a view to give a fraudulent preference to the officials of the said bank; and that they were kept concealed to deceive petitioners and other depositors; and that petitioners, as receivers of this court were deceived, and induced thereby to make large deposits in said bank; and that said receivers did make such large deposits; and that said bank and its officials received deposits from them after the contemplated closing, and did receive the sum of about \$14,644.27 after the petition for the appointment of a receiver had been prepared and was held for filing. The receivers alleging demand and refusal of the respondents, pray for process to hold them in contempt of this court until they shall pay over to the receivers the sums so obtained as aforesaid.

The respondents have united in a demurrer, raising the question as to whether they were officials of this court, or had disobeyed or resisted any lawful order of the court; and have separately answered to the same purport as the demurrer; and, further, denying notice of the bank's designation as a depository by the court; denying conspiracy or fraud; and averring, in substance, that while they knew of the involved condition of the bank they believed it solvent until the time of closing the doors; that the deeds of trust were made to secure valid indebtedness; and that in all things they acted as they believed for the best interest of the bank and its creditors; that the deposits by the receivers of the Houston & Central Railway were received in the regular course of business of the bank, and treated the same as deposits by other patrons of the bank; and they deny any intention to disobey or evade any orders of this court; and they aver many other things not necessary to recapitulate, as tending to justify their conduct in managing the affairs of said bank.

From the answers of the respondents, and the evidence produced on the hearing, the facts of the case appear to be, substantially, as follows:

In the above-entitled suit, pending on the equity docket of this court, an order was entered on the twentieth day of February, 1885, appointing Benjamin G. Clarke and Charles Dillingham joint re-

ceivers of all the property and effects of the Houston & Texas Central Railway Company, with power to manage, control, and exercise all the franchises of the same, and to run, operate, and manage the railways of the said company; that thereafter the said receivers qualified and entered upon the discharge of their duties, and entered into full possession and control of the said property and effects, and since have operated and managed as such receivers the railways of said company; that in the operation and management of said railways it became and was necessary that said receivers should make use of banks and depositories on the line of the railway, and at Houston, where the general offices were located, to deposit, temporarily, the moneys received by them as revenues of said railways, and necessary for them to pay out in the ordinary transaction of their business; and that accordingly said receivers, on March 5, 1885, petitioned the court for an order designating two banks or bankers in Houston as depositories of their funds, which petition was referred to the special master to investigate and report; and, accordingly, on the thirteenth of April, 1885, the special master reported that after an examination of the facts, and after consultation with the receivers, he advised that three banks in the city of Houston, to-wit, the City Bank of Houston, the First National Bank, and T. W. House, banker, be designated by the court as depositories of the moneys, funds, and securities of the receivers, which report was confirmed by order of court April 18, 1885; that prior to the said report and order the receivers, on the seventh of March, had opened an account with the City Bank of Houston, the cashier (respondent Weems) being then notified that the court had been applied to, to designate certain banks in which the receivers should keep accounts, from which time until the nineteenth of December the said receivers made various deposits of funds derived from the property in their hands, and drew checks against their deposits, which were paid; that the accounts opened by said City Bank of Houston were with Benjamin G. Clarke and Charles Dillingham, joint receivers of the Houston & Texas Central Railway, one account being a general account, relating to the general revenues derived from operating the railway, and another being a special account, relating to the proceeds of land sales collected by the receivers, under a consent decree in the case, made on the seventh of May, 1885, and another account for collections made by said bank for account of the receivers; that on the nineteenth of December the City Bank of Houston had on deposit, to the credit of said receivers, funds derived from general revenues of the railway, the sum of \$27,742; funds derived from land sales, the sum of \$4,466.72; and from collections, the sum of \$6,392.94; making a total of \$38,601.66; the sum of \$1,234 of the amount of the general account was received by the said bank and its officers on the eighteenth day of December, from shipments made by the agents of the receivers through the express companies, and the

sum of \$5,284.33 of the amount of the general account was received in like manner on the nineteenth of December; that on the nineteenth of December the officials of said bank refused to pay the checks drawn by the said receivers against the funds in said bank to their credit, and closed the doors of said bank, and in pursuance of arrangements made on the eighteenth of December, on a bill brought by the president of said bank, (respondent Baker,) on his own behalf, and on behalf of the said bank and the Houston Insurance Company, against one Robert Cohen and one Robert Brewster, in the district court of Harris county, Texas, all the assets, moneys, and property of said bank were turned over to the possession of the said district court for liquidation; and in said district court the cashier of the bank (respondent Weems) was appointed receiver, and as such put in possession of all the property and moneys of said bank, including the sums in said bank belonging to said receivers of the Houston & Texas Central Railway, and deposited by them, particularly the sums deposited by them on the eighteenth and nineteenth of December.

Thereafter the receivers made demand on the officials of said bank — to-wit, W. R. Baker, president; B. F. Weems, cashier; Robert Brewster, director; and S. K. McIlhenny, director—for the return and payment of the said sums belonging to the said receivers as aforesaid, but the same was refused.

It further appears that the charges of the receivers with regard to the execution of two deeds of trust to secure the president and directors in preference to the general creditors of the bank, and the withholding of said deeds from record until just before the bank was closed, are substantially correct, although it appears that the indebtedness secured to President Baker was mostly of long standing, and the other indebtedness secured was for accommodation paper given by the directors to aid the bank in keeping its business going, by what President Baker in his petition to the state court termed "kite flying." There is no doubt that the bank has been long insolvent, and would long since have closed its doors but for the credit it received on account of its large holding of real estate; that the deeds of trust, and the preferences therein given, were bound to be fatal to any further credit, as soon as publicly known; and it seems conclusive that the respondents knew of his condition, and of the certainty of failure,—certainly from the time they protected themselves at the expense of the people who had trusted in their honesty and financial management.

On the hearing, the argument took a wide range; but the real inquiry in this proceeding may well be restricted to the simple question of the relations of the respondents to the court. Counsel for the receivers contend that the effect of the order of court designating the bank as one of the depositories of the receivers, and the acceptance by the bank of the receivers' deposits, was to make the bank, and its

officers, officers of the court, and therefore directly responsible to the court for misappropriation of the moneys deposited by the receivers under the order of court.

The adjudged cases on this point brought to the attention of the court are unsatisfactory. The statement in *Rapalje on Contempts* (section 15) that "a private corporation, made the depository of the funds of the court, is an officer of the court, within the power of the court to punish by contempt process for misconduct, is supported by a *dictum* of the supreme court of Illinois in the case of *In re Western Marine & Fire Ins. Co.*, 38 Ill. 289, in which case it is said:

"When a court makes an order appointing a particular person a depository of the court funds, and such person, knowing of such order, accepts the deposit, he unquestionably becomes *pro hac vice* an officer of the court. The court may order him to refund the money, and if he fails to do so, *without showing some valid reason*, may proceed against him as for a contempt. The same rule would apply to a corporation, and if its officers, *having control of its funds, and having the means of payment belonging to the corporation in their hands*, should refuse to pay, they too might be proceeded against as for a contempt."

It will be noticed by the foregoing that officials of a corporation delinquent as a depository are to be held as in case of contempt, when they have control of its funds, and have the means of payment belonging to the corporation in their hands.

Counsel for receivers have also cited *Cartwright's Case*, 114 Mass. 230, which was a case where a receiver had appropriated the funds confided to him to his own use, and where there was no doubt about the official relation.

In the present case I think that it is somewhat doubtful whether the funds, deposited by the complaining receivers with the City Bank of Houston under the aforesaid order of court, were strictly court funds, or could be considered as moneys paid into court. By the orders appointing them, the complainants, as joint receivers, were authorized and directed to carry on and operate the railways and property of the Houston & Texas Central Railway Company; and such carrying on and operating contemplated and required the handling, receiving, and paying out of money, the payment and collection of bills, and the transaction of such financial business as would require the medium of and accommodation of banks. In the transaction of this business, moneys were not deposited as special funds to be drawn out on order of the court, but were deposited, generally, to the credit of the receivers, and to be handled and used by the bank, like the deposits of its other patrons, in a banking, loan, and discount business. And it may be further noticed that the respondents have not the possession of the funds of the bank, nor means in their hands belonging to the bank, the possession of respondent Weems, as receiver, being that of the district court of Harris county. So that if we take the law to be as broad as declared by the supreme court of Illinois, in the *Western Marine & Fire Ins. Case*, it is not broad enough

to meet the necessities of this case; for if it is conceded that the City Bank of Houston, by designation of the court and by acceptance, became an officer of the court, and that the funds deposited therein were court funds, and that therefore the bank is liable for misconduct in misappropriating such funds, as in case of contempt, there is neither reason nor authority for considering that each servant or agent of the bank also became *pro hac vice* an officer of the court, and therefore amenable to the court, as in case of contempt, for misconduct in dealing with the bank funds.

The conduct of the respondents, as officials of the Houston City Bank, and as trustees of the property and funds of the said bank, in securing themselves at the expense of the creditors and patrons of the bank with deeds of trust on the property which really gave credit to the bank, and in holding the bank out as solvent so as to draw in confiding depositors to furnish the means for the bank to continue "kite flying," was reprehensible; and no doubt, when proved in a proper case, will fix the personal liability of these respondents for all the losses resulting from their faithless management of the said bank; and the conduct of the respondents in taking the moneys of the receivers of the Houston & Texas Central Railway Company after the papers were made out to throw the bank in liquidation, and in turning the said moneys into the assets of an insolvent bank, (already destituted by them, to save themselves,) was still more reprehensible.

This conduct, although reprehensible, and not at all in keeping with the good character of respondents as attempted to be shown in the evidence of this case, I am not prepared to hold can be treated as in contempt of this court.

The rule for contempt herein is discharged; but an order is laid upon the receivers of the Houston & Texas Central Railway Company to institute such legal proceedings as may be necessary to make said respondents individually and collectively liable for all the funds wrongfully obtained from and withheld from said receivers. The costs of these proceedings for contempt will be taxed and paid in the main suit.

NOTE.

Cash deposited with a bank as a general deposit ceases to be the property of the depositor, and becomes the property of the bank, creating at once the relationship of debtor and creditor. *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675.

And so, where one leaves money with another for safe-keeping, with the understanding, not that the identical money shall be returned to him, but a like sum, it is not a bailment or special deposit, but a general deposit in the nature of a loan. *Shoemaker v. Hinze*, (Wis.) 10 N. W. Rep. 86.

Upon a special deposit a bank is merely a bailee, and is bound according to the terms of the special deposit; but on a general deposit by a clerk of the court, without special agreement, the money becomes the property of the bank, and the depositor has no longer any claim on that money; his claim is on the bank for a like amount of money. *McLain v. Wallace*, (Ind.) 5 N. E. Rep. 911.

KIE v. UNITED STATES.

(Circuit Court, D. Oregon. May 1, 1886.)

1. ALASKA—"INDIAN COUNTRY."

Alaska is not "Indian country" in the sense in which that phrase is used in the intercourse act of 1834 and the Revised Statutes.

2. SAME—JURISDICTION OF DISTRICT COURT THEREIN.

The district court of Alaska has jurisdiction, under sections 5339 and 5841 of the Revised Statutes, to try and punish any inhabitant of the district for the crime of murder or manslaughter committed by the killing of any human being therein; but the law of Oregon defining the crime of murder or manslaughter, and prescribing the punishment therefor, is not in force in Alaska.

3. CRIMINAL LAW—ERRONEOUS SENTENCE.

The plaintiff in error, being convicted of manslaughter, was sentenced to punishment therefor under the law of Oregon, instead of the act of 1875, (18 St. 473.) whereby his imprisonment was authorized for 20 days in excess of the punishment allowed by said act. *Held*, that the judgment was erroneous, and the same was reversed, with direction to have the plaintiff in error sentenced according to law.

4. JURY PRESUMED TO HAVE BEEN LEGALLY SELECTED AND DRAWN.

It appeared from the record that when the case was called for trial a jury came, who were duly impaneled and sworn. *Held*, that, in the absence of anything to the contrary, the presumption is that the jury were selected and drawn according to law.

5. SAME—SELECTION AND QUALIFICATION OF JURORS IN ALASKA.

Jurors to serve in the district court of Alaska must be selected in the manner provided in section 2 of the act of June 30, 1879, (21 St. 43,) and have the qualifications prescribed by the law of Oregon.

6. CRIMINAL LAW—TRIAL—PRESENCE OF THE DEFENDANT.

In the trial of a criminal action involving corporal punishment, the record should show that the defendant was present; but it is sufficient if his presence may be inferred from the whole record, without being explicitly stated at every stage of the procedure.

Error to District Court of Alaska.

Alfred S. Frank, for plaintiff in error.

Lewis L. McArthur, for defendant in error.

DEADY, J. This is a writ of error to the district court of Alaska, sitting at Sitka. The writ was allowed by the circuit judge, pursuant to section 7 of the act of May 7, 1884, concerning "a civil government for Alaska," (23 St. 24,) which provides:

"Writs of error in criminal cases shall issue to the said district court from the United States circuit court for the district of Oregon, in the cases provided in chapter 176 of the Laws of 1879; and the jurisdiction thereby conferred on the circuit court is hereby given to the circuit court of Oregon."

The "Laws of 1879" here referred to is the act of March 3 of that year, (20 St. 354,) which gives the circuit court for each judicial district jurisdiction of writs of error in criminal cases tried before the district court, where the sentence is imprisonment or fine not exceeding \$300.

It appears from the record that on May 28, 1885, the plaintiff in error, Charles Kie, was indicted by a grand jury of the district court

of Alaska, sitting at Sitka, for the crime of murder, alleged to have been committed about September 1, 1884, by stabbing a woman named Nancy, from which stabbing she then and there died. Kie demurred to the indictment, but the demurrer was overruled by the court; and afterwards, on a trial on the plea of "not guilty," he was by the jury convicted of the crime of manslaughter, and sentenced by the court to imprisonment for a term of 10 years and fined \$100.

There is no formal bill of exceptions in the record, but it contains a statement of certain evidence given to the jury on the trial, which, by the argument of counsel, is so far to have the effect of a bill of exceptions. From this it appears that the killing took place at the town of Juneau, situate on or near Takoo inlet, and distant about 80 miles north by east in an air line from Sitka, and at the date thereof the plaintiff in error was living in and belonged to a village of Alaskan aborigines near by; that the deceased, Nancy, was also an aboriginal Alaskan living with Kie as his wife, and that said Nancy was guilty of adultery, for which cause Kie killed her, as alleged in the indictment, he being permitted and authorized to do so by the laws and customs of the people of said village time out of mind, as a punishment for her misconduct; that on the close of the testimony a motion was made for the discharge of the defendant on the ground that, under sections 2145 and 2146 of the Revised Statutes, the court had no jurisdiction of the defendant, which motion was denied; and that after the verdict was received a motion was made to set aside the same, and discharge the defendant, on the same ground, which was also denied, to which rulings of the court the defendant then and there excepted.

The following are the errors assigned:

"(1) The record does not show that the plaintiff in error was present at the trial, or when sentence was pronounced on him. (2) No mode of selecting a jury is provided by the organic act. (3) The court had no jurisdiction to try the cause, and the judgment rendered is void."

The last assignment will be considered first. It is based on the assumption that Alaska is "Indian country," within the meaning of that phrase as used in the Revised Statutes, and section 2146 thereof, which in effect prevents the courts of the United States from taking cognizance of any crime committed by one Indian against the person or property of another, in the Indian country.

In *U. S. v. Seveloff*, 2 Sawy. 311, I held that Alaska was not "Indian country" in the conventional sense of the term; that because a country is owned or inhabited, in whole or in part, by Indians or aborigines, it is not therefore "Indian country" within the meaning of that phrase, as used in the intercourse act of 1834 or the Revised Statutes. This ruling was followed and affirmed in the cases of *In re Carr*, 3 Sawy. 317; *Waters v. Campbell*, 4 Sawy. 121; and *U. S. v. Stephens*, 8 Sawy. 117; S. C. 12 Fed. Rep. 52; and again followed and vindicated in the court below, in an able opinion by District Judge McALLISTER. 7 W. C. R. 6. The *Seveloff Case* was de-

cided in December, 1872; and on March 3, 1873, congress apparently gave its sanction to the theory of that case (17 St. 530) by amending section 1 of the Alaska act of 1868 (15 St. 240) so as to extend over the country sections 20 and 21 of the intercourse act of 1834, prohibiting the introduction and disposition of spirituous liquors therein. As it rests with congress to say whether a district of country shall be considered "Indian country," so far as the intercourse between the aborigines thereof and other persons is concerned, this legislation, in my judgment, by at least a reasonable, if not a necessary, implication, is equivalent to a declaration that Alaska is not to be considered "Indian country," only so far as concerns the introduction and disposition of spirituous liquors therein.

Nor is this conclusion contrary to the ruling in *Bates v. Clark*, 95 U. S. 204, or *Ex parte Crow Dog*, 109 U. S. 556, S. C. 3 Sup. Ct. Rep. 396, in the former of which Mr. Justice MILLER said "that all the country described by the act of 1834 as Indian country remains 'Indian country' so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or act of congress;" and in the latter of which Mr. Justice MATTHEWS gives the above paragraph from *Bates v. Clark*, and adds:

"In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes."

The conclusion is not in conflict with the ruling in *Bates v. Clark*, because, as we have seen, Alaska was not described or included in the act of 1834, the same being at the time foreign territory, and for the further reason that, if it had been, congress has since made special and different provision concerning the intercourse therein between the aborigines and others.

Nor do I think it is in conflict with the ruling in *Ex parte Crow Dog*, rightly understood. True, it is said in the opinion in the later case that the phrase may and does include territory acquired since the date of the act of 1834, and therefore not described in it. But the case then before the court arose in Dakota, a territory acquired from France in 1803, while the anomalous condition of Alaska was not probably considered by the court, or the language in question used with reference to it; but rather to the similar and contiguous territory acquired from Mexico in 1848, as New Mexico, Arizona, Nevada, Utah, and Western Colorado, which thereupon, in the language of section 1 of the act of 1834, (4 St. 729,) defining or describing the Indian country, became and were included in "that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana."

Nor is it at all probable that the aborigines of Alaska can or will be considered as dependent or domestic nations, or people having any title to the soil of the country, to be extinguished by the United States, as were the Indian tribes north and west of the Ohio river. The country was purchased from Russia in 1867. By article 2 of the treaty of purchase (Pub. Treat. 672) it is declared that "the cession of territory and dominion" thereby made, shall include "the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property." Article 3 provides that such of "the inhabitants of the ceded territory" as "prefer to remain" therein, "with the exception of the uncivilized native tribes, shall be admitted to all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." And article 6 declares such cession "to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions * * * by any parties, except merely private individual property holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in said territory or dominion, and appurtenances thereto."

At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was such, and only such, as it saw proper to acknowledge or concede to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best. Accordingly, congress, by the passage of the Alaska act of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of the inhabitants over and upon whom it shall have jurisdiction and authority. By this act (section 8) the laws of the United States relating to mining claims are extended over Alaska, and it is made a land-district, with a register and receiver to take proof of the location and make sale of such claims. A commission is also provided for, (section 12,) "to examine into and report upon the condition of the Indians residing in said territory; what lands, if any, should be reserved for their use; what provision shall be made for their education; what rights by occupation of settlers should be recognized; and all other facts that may be necessary to enable congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district." And the unorganized Alaska act of July 27, 1868, (chapter 3, tit. 23, Rev. St.; 15 St. 240,) is also continued in force except

as modified by the act of 1884, (section 14;) and "the importation, manufacture, and sale of intoxicating liquors in said district, except for medicinal, mechanical, and scientific purposes," is thereby prohibited under the penalties prescribed in section 4 of the act of 1868, (section 1955, Rev. St.), "for the importation of distilled spirits." How far this provision repeals or modifies said section 4, and the act of 1870, *supra*, amending section 1 of the act of 1868, so as to extend over Alaska sections 20 and 21 of the intercourse act of 1834, it is not now material to consider; for, admitting that the latter act displaces or modifies the former one, it is equally manifest from the passage of the same that congress does not regard Alaska as being within the purview of the law governing the "Indian country," and therefore it is necessary to make special provision concerning the introduction and disposition of spirituous liquors therein; or that, from the fact of making such special provision, it is evident that congress intended to exclude the act of 1834, as a whole, therefrom. And as to the state of law on this subject, before this last enactment, see *U. S. v. Stephens*, 8 Sawy. 116; S. C. 12 Fed. Rep. 52.

The people living in the village where this homicide was committed are a tribe or clan of the Thlinkets, a race of marine nomads that inhabit the coast from Mount St. Elias to the southern boundary of Alaska. They dwell in permanent villages during the winter, and wander about during the summer in search of food which is derived principally from the water. Petroff's Alaska, 165 *et seq.* In the disposition of the soil congress will doubtless make such provision for them, and the possession of their villages, as it may deem just and expedient. But for the discovery of gold in the vicinity no civilized man would ever be tempted to seriously interfere with or contest the right to such possession. And in such event it may be found best to provide that, for minor offenses peculiar to their social life and condition, the members of these tribes shall only be tried and punished by their own laws or customs, where they have any. Yet, if it is intended to impart to this people the elements of our civilization, as indicated by section 12 of the act of 1884, they must be first made subject to the law which conserves and maintains it, and not be allowed to practice with impunity such acts of barbarity as are involved in the charge against this plaintiff in error. But for the all-permeating and ever-present and persuasive power of the law, the progress of civilization among the most advanced people would be seriously and constantly retarded, if not checked, by the downward and backward tendency of the mass, who cannot, without this potent agency, be educated and maintained in the necessary habit of self-restraint and justice to others. However this may be, in my judgment, as the law applicable to the subject now is, Alaska is not "Indian country," in the conventional sense in which that phrase is used in the act of 1834 and the Revised Statutes.

Yet I regard this judgment as erroneous and void, not for want of jurisdiction in the court to hear and determine the case, but because

the sentence is in excess of the power of the court to impose. Section 3 of the act of 1884 provides for a district court for the district of Alaska, "with the civil and criminal jurisdiction" of a district and circuit court of the United States; and section 7 declares that "the general laws of the state of Oregon" then in force shall "be the law in said district, so far as the same may be applicable and not in conflict with the provisions" of that act, or "the laws of the United States." So far as the laws of the United States prescribe the jurisdiction of the district and circuit courts, or the method of their procedure, or define a crime and prescribe its punishment, the Alaska court is governed by them, and when these are silent, or make no provision on the subject, resort must be had to the laws of Oregon so far as they are applicable.

The defendant was indicted for the crime of murder under section 506 of the Criminal Code of Oregon, which defines the crime of murder in the first degree; and, being found guilty of manslaughter, was sentenced, under section 518 thereof, to imprisonment for 10 years, and to pay a fine of \$100; and, in pursuance of section 209 of said Code, to be also imprisoned until said fine is paid, not exceeding one day for every two dollars thereof. But section 5339 of the Revised Statutes provides for the punishment of "every person who commits murder" in "any district of country under the exclusive jurisdiction of the United States." Section 5341 of the same prescribes what killing in such a district constitutes manslaughter; and by section 1 of the act of March 3, 1875, (18 St. 473,) it is provided that "a person convicted of manslaughter in any court of the United States" shall be punished by imprisonment not exceeding 10 years and a fine not exceeding \$1,000. Now, Alaska is, and has been since 1867, "a district of country under the exclusive jurisdiction of the United States." Therefore, these statutory provisions concerning the commission and punishment of murder and manslaughter are in force therein, and necessarily exclude the operation or application there of any law of Oregon on these subjects.

In 1879 Kot-ko-wat, and in 1882 Ki-ta-tah, both aborigines of Alaska, were tried and convicted in this court, under the statute for murder committed in Alaska, and were punished with death.

No law of Oregon is to have effect in Alaska if it is in conflict with a law of the United States. There is such a conflict, within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case it is the law of congress that applies, and not that of the state. In this case the proceeding, though professedly had under the Oregon statute, was, in contemplation of law, taken under the statute of the United States, and conforms sufficiently thereto, except in the matter of the sentence.

The United States statute (section 5296, Rev. St.) provides that in case any person is sentenced to pay a fine, and has been imprisoned 30 days solely for the non-payment thereof, he shall be dis-

charged on showing his inability to pay the same. But by the sentence in this case the plaintiff in error, after serving his sentence of imprisonment, is to be confined 50 days longer for the non-payment of the fine of \$100, or one day for each \$2 thereof, without reference to his ability to discharge the same. And so the sentence, in effect, authorizes his imprisonment for 20 days longer than the law allows; and for this error the judgment is reversed, and the cause remanded, with directions to the district court to cause the plaintiff in error to be brought before it, to receive such sentence as the law warrants, and the court may deem proper.

This makes it unnecessary to consider the other assignments of error on this writ. But as they go to the validity of the proceeding anterior to the judgment, the case may be brought here again for review if they are not now disposed of.

As to the second assignment of error very little need be said. The act of June 30, 1879, (21 St. 43,) makes provision for the selection and drawing of jurors in the national courts, and the district court of Alaska should conform to it. There is nothing in the record in this case to show that it did not, and the presumption is that it did. No objection appears to have been taken to the selection or drawing of the jury. The record simply states, in the usual way, when the case was called for trial, a jury came, and was duly impaneled and sworn.

But the question of who is qualified to serve as a juror in the district court of Alaska must be answered by the law of Oregon. Section 800 of the Revised Statutes, which declares that jurors in the national courts shall have the qualifications prescribed by the law of the state in which they sit, cannot apply, for there is no law of Alaska on the subject, unless it be the law of Oregon; and in either case it follows that the qualification of jurors in Alaska, and the liability of persons to serve as such, must be determined by a reference to this law. Sections 918, 919, and 920 of the Code of Civil Procedure contain the law of this state on the subject. They provide that a person is not competent to be a juror unless he is (1) a citizen of the United States; (2) a white male inhabitant of the county for the year before he is called; (3) over 21 years of age; and (4) in the possession of his natural faculties.

Who are citizens of the United States in Alaska, under article 3 of the treaty of 1867, may be a difficult question to determine. The treaty furnishes the law, but the difficulty, if any, will arise in the application of it. Under the treaty, the inhabitants of Alaska at that date who did not return to Russia within three years thereafter became citizens of the United States, excepting members of the uncivilized tribes. The word "white" in the second clause is no longer regarded as the law of the state; and is expressly displaced, so far as the courts of the United States are concerned, by the proviso to section 2 of the act of 1879, *supra*. The words "county in which he is returned," in the same clause, must be held inapplicable to Alaska,

where there are no counties, and their place supplied by the word "district." The following sections of the Code, providing for the selection of jurors and the formation of a jury-list by the county court from the assessment roll are of course inapplicable, as there are neither county courts nor assessment rolls in Alaska. And, besides, the act of 1879 prescribes another mode for selecting jurors.

The first assignment of error must also be allowed. It appears from the record that the plaintiff in error, who was in close custody, was brought into court on May 22, 1885, and arraigned, when his trial was set for June 1st. On that day, and all subsequent days of the trial, down to and including the sentence, June 8th, the record only shows that the parties came by their attorneys. In case of a felony, or where corporal punishment is involved, the defendant must be present during the trial and at the sentence; and the record should show this. But it is sufficient if his presence may be inferred from the same, and it need not be explicitly so stated at each stage of the procedure. *Stephens v. People*, 19 N. Y. 549; Whart. Crim. Pl. & Pr. §§ 540, 875; *State v. Cartwright*, 10 Or. 193. But it would be a strained and unreasonable inference to say that Kie was present during this trial, and at the sentence, simply because he appears to have been present at the arraignment some days before; and particularly when the record states explicitly that the parties appeared by their attorneys each day during the trial, and at the sentence, from which it may rather be inferred that the plaintiff in error did not appear otherwise. But from the admission of counsel on the argument, it is morally certain that Kie was present during the trial, and that the failure of the record to show the fact is a mere misprision of the clerk, and therefore the district court will not be directed to set aside the verdict and grant a new trial, but only to allow the plaintiff in error to move therefor on that ground; and if, on the hearing of the same, it does not satisfactorily appear from the evidence submitted therewith that he was present, to grant the same; but otherwise to deny the motion, and give judgment against him according to the act of 1875.

CELLULOID MANUF'G CO. v. COMSTOCK & CHENEY CO.¹

(Circuit Court, D. Connecticut. April 24, 1886.)

1. PATENTS FOR INVENTIONS—WHAT IS PATENTABLE.

It has always been the law that a patentable invention, although new and useful, must be the result of something more than and different from mechanical skill.

2. SAME—INVENTION—UTILITY AND NOVELTY AS EVIDENCE OF.

The existence of novelty and utility in a patented thing has been potent in

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

the determination of the question of its patentability. *McCormick v. Seymour*, 2 Blatchf. 240; *Furbush v. Cook*, 2 Fisher, 288; *Middlton Tool Co. v. Judd*, 3 Fisher, 141.

3. SAME—INVENTION—EVIDENCE INDEPENDENT OF UTILITY AND NOVELTY NOW REQUIRED.

The decision in *Hollister v. Benedict & Burnham Manuf'g Co.*, 113 U. S. 59, S. C. 5 Sup. Ct. Rep. 717, makes independent evidence of the existence of inventive skill, apart from inferences of such existence which may be drawn from novelty and utility, to be of greater importance than has been understood heretofore.

4. SAME—HYATT PATENT—CELLULOID COVERING FOR PIANO KEYS.

The question of patentability in Hyatt's invention again considered, and the patent sustained.

5. SAME—HYATT'S INVENTION.

There was the creative faculty of invention in the abandonment of the ineffectual and mechanical attempt to make single celluloid keys in imitation of ivory single keys, and in the conception of the idea of covering a whole key board with a single celluloid sheet.

6. SAME—PRACTICE—SUSPENDING ACCOUNTING.

The patent in suit having been declared void for want of novelty by another court, (*Celluloid Manuf'g Co. v. Tower*, 26 Fed. Rep. 451,) from which decision a notice of appeal to the supreme court had been given, a stay of the accounting was asked in this case; but as the facts in this case had features not brought out in the other case, held, that there was no adequate reason for a stay of the accounting.

Motion for Rehearing. The former opinion was rendered July 31, 1884, and is reported in 21 Fed. Rep. 313. The important ground of the motion was that since the date of the former opinion the supreme court of the United States had, by judicial authority, in *Hollister v. Benedict & Burnham Manuf'g Co.*, 113 U. S. 59, S. C. 5 Sup. Ct. Rep. 717, and *Thompson v. Boisselier*, 114 U. S. 1, S. C. 5 Sup. Ct. Rep. 1042, so far changed the law of the land governing reissues as that the claimed invention purported to have been secured by the letters patent in suit is excluded from claims to patentability.

John K. Beach and *John S. Beach*, for the motion.

Frederick H. Betts, against the motion.

SHIPMAN, J. This is an application by the defendant in the above-entitled case for a rehearing. The hearing upon the application was considered to be practically a rehearing or reargument of the question of patentability. The facts were substantially stated in the opinion of the court in 21 Fed. Rep. 313. The important ground for a rehearing is stated in the application as follows: "That since said interlocutory order and decree was passed the law of the land governing the question of patentability of inventions has been so far changed, under the judicial authority of the supreme court of the United States, as that the claimed invention purported to have been secured by the letters patent in suit is excluded from claims to patentability."

The opinion of this court was rendered July 31, 1884. The decisions of the supreme court to which reference is made are *Hollister v. Benedict & Burnham Manuf'g Co.*, 113 U. S. 59, S. C. 5 Sup. Ct.

Rep. 717, and *Thompson v. Boisselier*, 114 U. S. 1, S. C. 5 Sup. Ct. Rep. 1042. The first of these cases was decided January 5, 1885.

The following sentences from the former opinion of this court state the point in controversy with sufficient clearness:

"The invention did not consist in the substitution of celluloid for ivory, whereby a reduction in the price of keys was caused, but it consisted in the fact that, by the use of celluloid, there was practically furnished a new and useful mode of constructing key-boards, viz., by cementing to the board a single sheet of the veneer, instead of by gluing a large number of separate pieces of ivory, which must each be matched and separately fastened to the wood. This new method of construction was impracticable with ivory, or with any material which was known before celluloid was manufactured, and it required invention to find out and demonstrate that key-boards could be manufactured so as to be a commercial article by covering their upper surfaces with a single sheet of a material which would make an attractive and permanent coating for the wooden keys, because from the fact that celluloid existed it by no means followed that a key-board could be sufficiently and successfully covered with it."

The single point now in the case is this: In view of the recent judicial statements of the requisites necessary to cause a new and useful improvement to be a patentable invention, as contrasted with the method of reasoning by which judges were formerly accustomed to pass upon the question of the presence of inventive skill, was the decision of the court in favor of patentability correct? It has always been the law that a patentable invention, although new and useful, must be the result of something more than and different from mechanical skill; but the existence of novelty and utility in a patented thing was potent in the determination of the question of its patentability. This is clearly shown in the well-known charges to the jury of Mr. Justice NELSON in *McCormick v. Seymour*, 2 Blatchf. 240, and of Mr. Justice CURTIS in *Furbush v. Cook*, 2 Fisher, 288. Judge WILLIAM D. SHIPMAN in *Middletown Tool Co. v. Judd*, 3 Fisher, 141, expressed the views which judges were wont to entertain in regard to the rigor with which courts should search for the presence of inventive genius as follows: "Whenever a change or device is new and accomplishes beneficial results, courts look with favor upon it. The law in such cases has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new devices." In *Hollister v. Benedict & Burnham Manuf'g Co.* the court was called upon to consider an improvement which was admitted to be novel, and to be of superior utility, and which was not a slight advance in the art, but which was yet held to involve "only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge," and not to be the "creative work" of the "inventive faculty." The facts which were apparent in the record of the case, and which are disclosed in the opinion, as well as the vivid language of Mr. Justice MATTHEWS, who spoke for the court, make the decision a very significant one; for the stamp which the internal revenue department caused to be used was a marked im-

provement upon its predecessor, remedied a serious evil, and was regarded by the department with great satisfaction. It must be seen that this decision makes independent evidence of the existence of inventive skill, apart from inferences of such existence which may be drawn from novelty and utility, to be of greater importance than has been understood heretofore.

The facts in the case fully justify the finding of novelty and utility. The facts upon the question of invention are these: While the idea of a continuous ivory key-board has been attempted, it was practically and commercially a failure. Celluloid for single keys had been suggested and attempted, and was a failure. A continuous covering for a key-board would probably diminish the expense of production. Hyatt had unsuccessfully tried celluloid strips for single keys. He abandoned that idea, and got the idea of using a single sheet of celluloid, and waited until he had succeeded in satisfactorily making thin sheets. This manufacture of thin sheets was a very important step in the art, and caused celluloid to be capable of a new variety of uses. He then applied these sheets, having the capacities of hardness, smoothness, susceptibility of polish, and uniformity of color, to a piano key-board. On the one hand, the argument is that the inventive, the creative, idea—the genius—of the inventor consisted in the conception that the use of a whole sheet of celluloid would overcome the difficulties which attended the use of single strips, and would make a key-board equal to and cheaper than one made of ivory strips, and that subsequent experiment successfully embodied and carried into effect the idea. Polished sheets and various kinds of cement were tried and abandoned, and finally the sheet which is now in use was found to be adapted to the necessities of the work. On the other hand, it is said that a continuous veneer of a blank key-board was not a new idea; that it had been accomplished; and that when the new thin sheets of celluloid had been produced the idea of applying the sheet, and the application of it to a key-board, was merely the “display of the expected skill of the calling.” To produce the sheet required invention, but the application of the sheets as a substitute for ivory was the work of the mechanic.

While the mind may hesitate whether one or the other line of argument preponderates, I think that there was the creative faculty of invention in the abandonment of the ineffectual and mechanical attempt to make single celluloid keys, in imitation of ivory single keys, and in the conception of the idea of covering a whole key-board with a single celluloid sheet,—an idea which, when embodied, turned into commercial success what had previously been only an unsuccessful theory in regard to a similar use of ivory. It is urged by the defendant that inasmuch as the circuit court for the district of Massachusetts in the case of the *Plaintiff v. Tower*, 26 Fed. Rep. 451, had decided the plaintiff's patent to be void for want of patentability, and the plaintiff has given notice of an appeal to the supreme court, it

would be proper to suspend the accounting in this case until the *Tower Case* shall have been tried. Upon the facts as detailed in the opinion of the court the decision of the *Tower Case* was right. The facts in this case have features which were not apparently brought out in that case. Therefore I think that there is no adequate reason for a stay of the accounting.

The motion for rehearing is denied.

NEW YORK BELTING & PACKING Co. v. MAGOWAN and others.¹

(Circuit Court, D. New Jersey. February 18, 1886.)

1. PATENTS FOR INVENTIONS.

Letters patent No. 86,296, of January 26, 1869, to the New York Belting & Packing Company, as assignee of Dennis C. Gately, for improved vulcanized rubber packing, sustained, and *held* infringed.

2. SAME—DISTINCTION BETWEEN INVENTION AND MECHANICAL SKILL.

The line between invention and mechanical skill is not always clearly drawn. Invention indicates genius and the production of a new idea. Mechanical skill is applied to an idea, and suggests how it may be modified and made more practical.

3. SAME—EXTENSIVE ADOPTION OF DEVICE, EVIDENCE OF INVENTION.

The fact that the patented device went at once into such extensive public use as almost to supersede older devices is pregnant evidence of novelty, value, and usefulness, and accounts for the defendants' infringement.

On Bill, etc.

Turner, Lee & McClure, for complainant.

F. E. Lowthorp, Jr., for defendants.

NIXON, J. Letters patent No. 86,296, for "improved vulcanized rubber packing," were granted to the complainant corporation, as assignee of Dennis C. Gately, on January 26, 1869, and this suit is brought to recover profits and damages for their infringement.

The answer of the defendants (1) denies infringement; (2) alleges that Gately was not the original and first inventor of the thing patented; and (3) claims that the letters patent are void, (a) because the single claim is too broad, covering more than Gately invented; (b) because the specifications fail to sufficiently distinguish between what was novel and what was old in the art; (c) because, in view of the state of the art at the date of the issue of the patent, no invention is exhibited and shown.

The defense of non-infringement was not well taken, not being sustained by the evidence. The packing manufactured by the defendants in 1882 and 1884 were exhibited. The first was an exact counterpart of the complainant's product under its patent, and the second was a feeble attempt at evasion, by having only the central

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

part of the inner surface of the canvass, next to the piston-rod, cut bias.

The other defenses, which may be fairly grouped under the single allegation of want of patentability of the invention, in view of the state of the art, have caused more difficulty, and required more careful examination. In the specifications of the patent the inventor states that his invention relates to packing of the kind for which letters patent were issued to Charles McBurney on June 28, 1859; that the defect of the McBurney invention was that the packing was not sufficiently elastic to maintain a tight joint between it and the piston, and that he has secured this greater elasticity by "forming the packing with a backing of pure vulcanized rubber, * * * which may be covered and protected by a strip of canvas or other suitable fabric." He claims that when a packing thus formed is placed in the stuffing-box and around the piston, and the follower is screwed down, so as to compress the packing, the rubber strip will also be compressed and forced against the sides of the stuffing-box, and, as it cannot expand in the direction of the follower, it acts as a spring to hold the packing against the piston-rod, and to prevent leakage, compensating for any slight wear in the packing, and making a tight joint between the rod and the packing.

The claim of the patent is:

"The combination with the packing, such as herein specified, of an elastic backing or cushion of vulcanized India rubber, substantially as and for the purposes set forth."

It is quite clear from these specifications that the patentee conceived that he had remedied the defects, and made an improvement upon the then existing McBurney patent. Turning to that patent, we find that it was granted on June 29, 1859, for an "improvement in packing for stuffing-boxes of pistons." It was claimed by the inventor to be a durable substitute for the hempen packing before employed in stuffing-boxes,—more easily adjusted to produce a uniform pressure upon all sides of the piston-rod,—but in practical use it fell short of accomplishing what the patentee claimed for it. Frequent complaints came from the purchasers to the manufacturers that it was too stiff and rigid, and was not compressible enough to make a tight joint in the stuffing-box. Gately, the patentee, who was the superintendent of the complainant corporation, set himself to the task of overcoming the defects. He made several experiments, and the result was the patent on which the suit is brought. He added to the McBurney packing the elastic backing or cushion of vulcanized India rubber, which not only rendered the whole more compact and more elastic, but, being compressed between the follower and the sides of the stuffing-box, acted as a spring to hold the packing continuously against the piston-rod, thus making a tight joint, which had not been attained under the McBurney invention, and was not shown to have been so well accomplished under any other patent.

Whether a thing devised is due to the genius of an inventor, or to the mechanical skill of a workman, is often a difficult question to determine. The line between them is not always clearly drawn. Invention indicates genius and the production of a new idea. Mechanical skill is applied to an old idea, and suggests how it may be modified and made more practical; and, according to *Smith v. Nichols*, 21 Wall 112, such mere modification is not patentable unless some new and useful result is secured.

The complainant's patent is nearly on the line dividing invention from mechanical skill; but, after carefully comparing it with the exhibits which are put in to show anticipation and its lack of patentability, I am of the opinion that the combination reveals invention, not so much because the packing is more elastic by reason of the addition of pure hard rubber, but because the patent discloses a new and better method of obtaining a tight joint between the packing and the piston-rod than has been obtained by any other combination of elements, new or old. It is a fact not to be overlooked, and has much weight, that the product manufactured under it went at once into such extensive public use as almost to supersede all packing made under other methods. Such a fact is pregnant evidence of its novelty, value, and usefulness, and accounts for the defendants' infringement.

Let a decree be entered in favor of the complainant, and for an account.

WETHERELL v. KEITH and others.¹

(Circuit Court, N. D. Illinois. 1886.)

1. PATENTS FOR INVENTIONS—EVIDENCE OF PRIOR USE.

In order to defeat a patent on the ground of prior use, such use must be established beyond reasonable doubt. *Coffin v. Ogden*, 18 Wall. 120; *Washburn & Moen Manuf'g Co. v. Huish*, 4 Fed. Rep. 900.

2. SAME.

Where a witness testified to his use of a patented invention 16 years before the time when he testified, and that he employed some 10 persons in its manufacture, and yet could not tell the names of any of such persons, *held*, that his testimony failed to make out a defense.

3. SAME.

Two witnesses testified in 1884 to seeing the patented device in use in 1864, but their testimony was indefinite, and contradicted in many important particulars, and none of the alleged prior devices were produced. *Held*, insufficient to defeat the patent.

4. SAME—CARPENTER PATENT No. 116,411—HOOP-SKIRTS.

This patent sustained over the alleged prior use by Max Schwab, at Ottawa, Illinois, and that seen by Robert G. Lester and August Seligman, in 1864.

Merriam & Whipple, for complainant.

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Moses, Newman & Reed, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of letters Patent No. 116,411, granted June 27, 1871, to Charles C. Carpenter, for "an improvement in hoop-skirts," and duly assigned to complainant. The device covered by the patent is probably best described by the patentee himself in his specifications. He says:

"My invention is an improvement upon the skirt patented by Samuel Peberdy, November 30, 1858, in which the hoop or skirt is continuous, and is wound spirally from the top to the bottom of the skirt; and also upon the hoop-skirt patented by William H. Towers, November 17, 1868, having an upper and a lower nest of hoops and an intervening space; and my said improvement consists in forming the lower nest of the skirt of the same wire which crosses spirally the space between the upper and lower nests, and unites the two nests together; also in forming the lower portion of the bustle, and front guards or fenders for the knees, by a series of wires attached to and starting from the front of the waistband, and passing spirally around both sides of the skirt, interlacing with each at the bustle, and terminating at the front of the waistband; by which improvements the following, among other desirable advantages, are obtained, viz.: economy in the manufacture of the skirt; increased stiffness and supporting power by the interlacing at the back, near the top or waist; and front guards or fenders to prevent the projection of the knees through and into the intervening space; and rendering the skirt more agreeable and convenient for the wearer. * * * The lower skirt or nest of hoops is formed by a single wire, one end of which is attached to one end of the front tapes of the bustle, and continuing around spirally, parallel with the continuous fender and bustle wires, leaves the same at the front thereof, and forms, by continuous revolutions, the lower nest, separate and distinct from the upper, and yet connected to it by the same wire from which the lower nest is formed, thus obtaining a hoop-skirt having two nests, with the intervening wires forming a part of both nests, and holding the lower nest from swaying."

The patent also contains a disclaimer in the following words:

"I am aware that one or more bracing hoops, which extend from a point at or near the top of the skirt at the back to a point at or about the height of the knees of the wearer in front, have been patented by Charles E. Pratt, July, 1870, and I therefore do not claim such bracing hoops as my invention."

The claims of this patent are as follows:

"(1) In a hoop-skirt having an upper and a lower nest of hoops, with an intervening space, the lower or skirt nest thereof formed by the same hoop, 9, which passes spirally through the space between the upper and the lower nests, and unites the two together without use of separate wires or fastenings, as described. (2) The lower portion of the bustle nest and the knee-guards or fenders of the lower nest, formed by one and the same series of wires, 5, 6, 7, and 8, in the manner described. (3) The bustle and knee-guard wires crossed and interlaced at the back, for the purpose of increasing the strength and supporting power of the skirt at the back, as described. (4) In a hoop-skirt in which the lower nest is formed of a continuous wire, which also unites it with the bustle nest, the combination therewith of the separate wires, 5, 6, 7, and 8, crossed and interlaced at the bustle or back, and the knee-guards or fenders, *g*, formed thereby, crossing the front space above the lower hoops, as described."

The fact of infringement is conceded, and the only defenses set up are want of patentable novelty, and the public use for more than two years before this patent was applied for.

The witnesses by whom a prior use is attempted to be shown are Max Schwab, Robert G. Lester, and August Seligman. Schwab states that he made skirts constructed like the patent in Ottawa, Illinois, about 16 years before the date of his deposition, his testimony having been taken in December, 1884; that he copied the skirts he so made from one he bought of a traveling man. He seems to have had a small store at Ottawa for about two years, but is unable to fix the date when he began and closed the business there, and says he employed about 10 persons making such hoop-skirt, and yet can give the names of none of them. Lester and Seligman testified to seeing skirts in the market as early as 1864, but their testimony is indefinite. No skirts, or patterns of skirts, or forms on which they were made, are produced; and both witnesses are contradicted in many important particulars by persons to whom they referred as being connected with them at the time they claimed to have seen the skirts in question. The proof also shows that both Schwab and Seligman are infringing the complainant's patent, and that Lester is in the employ of Seligman. The proof also shows that C. C. Carpenter & Co. began the manufacture of hoop-skirts of the structure shown in this patent in 1870, and put them quite extensively upon the market; and I think it is more than probable that these two witnesses are all mistaken as to the time when they first saw these skirts on sale, and that they did not see them until Carpenter had commenced their manufacture, for which he subsequently obtained a patent in apt time.

Upon the whole, then, I come to the conclusion that the defendants' proof of prior use is not sufficiently clear and certain to establish such prior use before the date of Carpenter's invention. The rule as laid down in *Coffin v. Ogden*, 18 Wall. 120, and *Washburn & Moen Manuf'g Co. v. Haish*, 4 Fed. Rep. 900, requires that the fact of prior use shall be established beyond reasonable doubt, and I cannot say that this is done by the proof in this case. I therefore find that the patent is valid, and that the defendants infringe, for which the complainant is entitled to damages, and a decree may be prepared accordingly.

RACINE SEEDER CO. v. JOLIET WIRE-CHECK ROWER CO. (Bill and Cross-Bill.)¹

(Circuit Court, N. D. Illinois. April 5, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT MUST BE PROVED.

In a suit for infringement of the fourth claim of letters patent No. 76,908, of February 21, 1868, for a broad-cast seeder, the only proof as to the kind of machine made by the defendant was the testimony of a witness that the defendant was making a seeding-machine with two feeding holes and a disk. *Held*, "this proof does not make even a *prima facie* case of infringement without proof showing that the feeding holes and disk in defendant's machine perform the same function as those covered by the fourth claim of the Floyd patent."

2. SAME—EQUITY JURISDICTION.

As this patent was within about two months of its expiration at the time the bill was filed, *held*, that it was doubtful whether, under the rule in *Root v. Railway Co.*, 105 U. S. 189, the court had jurisdiction in equity, and the bill was therefore dismissed without prejudice to a suit at law.

3. SAME—BARGAIN—WHAT IS EVIDENCE OF.

Where parties had met and discussed the subject of the purchase by one of a patent from the other, but the terms of purchase were not fixed in the personal interview, but were subsequently settled by interchange of letters between the parties, *held*, that these letters were the evidence of what the bargain was.

4. SAME—ESTOPPEL.

A party who clothes another with the legal title to a patent, and relegates to the assignee the question as to who shall have the benefit of the purchase, is estopped to complain of fraud because another was not allowed to share in the benefit of such purchase.

5. SAME—ASSIGNMENT OF PATENT—CONVEYANCE BY RECORD OWNER VALID.

Where a party owning the title of record to a patent for over six months conveyed it for a valuable consideration to a corporation competent to purchase and hold it, and whose title was made a matter of record in the patent-office, *held*, that this title could not be attacked for fraud in the assignor to the corporation.

6. SAME—KNOWLEDGE OF ACT OF AGENT BINDS PRINCIPAL.

S. claimed that a bank had, against instructions, delivered a deed to a patent without payment of purchase money, instead of holding the deed as collateral to secure a note given in payment. It appeared that S. knew of the action of the bank, but took the note and discounted it. *Held*, that S. could not be allowed, even against his immediate assignee, to treat the deed as having been obtained by such fraud as would vitiate it.

7. SAME—PERSONAL LICENSE UNDER A PATENT, NOT ASSIGNABLE.

S. empowered H., by contract in writing, as his lawful attorney, to sell rights under a patent at prices to be approved by S. for the then unexpired term of the patent, and authorized H. to manufacture under the patent at a certain royalty, but reserved the power to revoke the contract in case H. should not faithfully perform his agreements under it. *Held*, that the contract, both as a power to sell and as a license, was a merely personal one, and not transferable by H. except with the consent of S., and that when S. parted with his title to the patent he parted with his right to sanction or vivify any assignment from H.

This was a bill to restrain infringement of two patents, one of which had about two months to run at the time the bill was filed. Defendant's answer denied infringement of one of the patents, and alleged that it was void for want of novelty, and admitted that the

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

other patent was valid, and that defendant used it, but insisted that the title belonged to the defendant. Defendant also filed a cross-bill setting up its title to the latter patent, and praying that complainant's title might be set aside as fraudulent and void, as against complainant in the cross-bill, and that the complainant in the cross-bill might be adjudged the lawful owner of said patent, and entitled to an accounting from the complainant in the original bill for infringement of said patent. The facts concerning the title to the patent are stated in the opinion.

H. W. Wells and *J. T. Fish*, for complainant.

George S. House and *Coburn & Thacher*, for defendant.

BLODGETT, J. The original bill in this case was filed to restrain the alleged infringement of patent No. 76,903, granted February 21, 1868, to P. G. and E. C. Floyd, for a "Broad-cast Seeder," and Patent No. 136,107, granted February 18, 1873, to J. W. Strowbridge, for a "Seeding-machine," of which patents the complainant claims to be the owner. Infringement of only the fourth claim of the Floyd patent is insisted upon, and as to this patent defendant denies any infringement, and insists that the patent is void for want of novelty.

There is no proof in the record as to the kind of machine made by defendant, and no proof of infringement except that the witness Dorr testifies that the defendant is making a seeding-machine with two feeding holes and a disk. This proof does not make even a *prima facie* case of infringement, without proof showing that the feeding holes and disk in defendant's machine perform the same function as those covered by the fourth claim of the Floyd patent. I therefore feel compelled to find that there is no proof of infringement of the Floyd patent; but as the main controversy in the case is centered about the other patent, and as this patent was within about two months of its expiration at the time the bill was filed, leaving it doubtful under the rule in *Root v. Railway Co.*, 105 U. S. 189, whether the court has jurisdiction in equity, I shall dismiss the bill without prejudice as to this patent, so that complainant, if it chooses to do so, can bring its suit at law for infringement and damages.

As to the Strowbridge patent, the defendant, the Joliet Wire-check Rower Company, admits by its answer the validity of this patent, and that it is manufacturing machines in accordance therewith, but claims to be the owner of said patent, and has filed its cross-bill asserting its own title, and denying complainant's title thereto, and praying that complainant's title may be set aside and held to be fraudulent and void as against the complainant in the cross-bill, and that the complainant in the cross-bill may be adjudged the lawful owner of said patent, and entitled to an accounting from the complainant in the original bill for the infringement of said patent. Under the issues made by this cross-bill voluminous proofs have been taken and discussed by counsel. The controversy involves certain dealings be-

tween Clarence S. Strowbridge and O. F. Hartwell, and Strowbridge and C. W. Dorr, and Dorr and the complainant in the original bill, and the effect of those dealings upon the title to the patent.

The facts, as they appear in the proof, seem to be that on August 24, 1881, Strowbridge was the owner of this patent, with the exception of the state of Massachusetts and some counties in New York, Michigan, and perhaps Iowa, and on said date he gave to Hartwell a contract in writing containing the elements of a power of attorney, and license, by which he empowered Hartwell, as his lawful attorney, to sell, transfer, and dispose of territory and shop rights to use said patent at prices to be approved by himself, (Strowbridge,) and to have and control the same for that purpose during the then unexpired term of the patent, for which Hartwell was to pay Strowbridge one-half of the proceeds of such sales, and Hartwell was also given the right to make and sell machines under the patent, for which he was to pay Strowbridge 50 cents for each machine so made and sold by him, with power reserved to Strowbridge to revoke the contract in case Hartwell should not faithfully perform his part thereof, or should not account for or pay over the money received by him, or in case Hartwell should discontinue said business or the manufacture of machines. At the time Hartwell obtained this contract Strowbridge resided in Cortland, New York, and Hartwell lived in Des Moines, Iowa, or soon after went there to reside; and about January, 1882, Hartwell entered into an arrangement with C. W. Dorr and Morton Mitchell by which they formed a corporation under the laws of Iowa, with a capital of \$1,500, called the Des Moines Manufacturing Company, for the manufacture and sale of machines under the Strowbridge patent, each of the partners taking \$500 of the capital stock of the company, and Hartwell assigning the contract between himself and Strowbridge to the company; and the company entered upon the business of manufacturing and selling machines made under this patent.

Neither the contract between Strowbridge and Hartwell, nor the assignment thereof from Hartwell to the Des Moines Manufacturing Company, was ever recorded in the patent-office.

The Des Moines Manufacturing Company commenced the manufacture of seeders under the patent, and made and sold for the season of 1882 about 175 machines, the royalty on which, under the Hartwell contract, amounted to \$87.50, which was payable on November 1, 1882. In June, 1882, Dorr visited Strowbridge at his home in Cortland, and had some conversation with him about the business of manufacturing machines under the patent, and about some other patents in connection with the business, and expressed a willingness to buy the patent from Strowbridge if they could agree upon terms. He introduced himself to Strowbridge as Hartwell's partner, and in talking about the purchase used the word "we;" but no price or terms seem to have been mentioned, and certainly were not settled

or agreed upon at that time. After Dorr returned to Des Moines he received a letter from Strowbridge, dated August 7, 1882, in which he says:

"What is the prospect of our making a deal on the power machine? I expect to go to Florida the forepart of September, and, if there is anything to be done, would like to hear from you as soon as convenient."

To this Dorr replied by letter dated August 10, 1882:

"I have just returned from my trip east, and will write you in a few days about the patent,—as soon as we make up our minds what we can do."

And on September 6, 1882, Dorr writes Strowbridge:

"We have thought the matter over a good deal, and have concluded to make you the following offer for the patent to the seeder: \$500, (five hundred dollars,) to include the royalty due you this fall, which we will pay you as soon as due, and the balance July 1st, next. This is with the understanding that you furnish us an abstract of the title showing the title clear from the government. Considering that ten of the fourteen years have expired, I think this is a good offer."

This letter was answered by Strowbridge under date October 18, 1882, in which he says:

"We will accept your proposition, and furnish all the required papers. It seems a very small amount as compared with what we have spent on the machine, but we need the money, and necessity is a stern master."

To this letter Dorr replied by letter, dated October 24, 1882:

"Will consider the matter settled, and are ready to settle with you as soon as you get the papers, etc., which I trust will be all right. You can send the papers to the Valley Bank of this place, where I will pay the money; or you can send them direct to me, and I will remit direct to you."

On November 15, 1882, Strowbridge forwarded by mail to the Valley Bank of Des Moines an assignment of the patent, with a letter of instructions as follows:

"*Valley Bank, Des Moines, Iowa:* Send you to-day an assignment of patent for C. W. Dorr, which you will please to deliver on receipt of \$500, and remit the same, less your trouble, to me."

And on the same day Strowbridge wrote Dorr:

"Received the papers from Washington yesterday, and have had the assignment made to-day, and sent the same to the Valley Bank. *Made papers to you, and you can do with them as you wish.*"

Considerable correspondence then passed between Strowbridge and Dorr, running from November, 1882, to March, 1883, in regard to certain defects found by Dorr in Strowbridge's title; but finally, on March 31, 1883, Dorr paid to the bank \$87.50 in money, and gave his note payable to Strowbridge, July 1st following, for \$412.50, and the bank delivered the papers to Dorr, and remitted the note and the money, less one dollar for charges, to Strowbridge. On the same day Dorr wrote Strowbridge:

"I have this day paid to the Valley Bank \$87.50, the amount due you on first payment. The balance you will see, by reference to my proposition which you accepted, was to be paid July 1st next, but it seems as though you

overlooked this, as you asked them to collect it all. I have given a due-bill for the balance, as per the arrangement, which I trust will be satisfactory."

The remittance from the bank was acknowledged by Strowbridge by a postal card dated April 6th, saying: "Your remittance of draft and note duly received. Thanks."

After the bank had received this acknowledgment from Strowbridge, and about the twelfth of April, 1883, Dorr caused the deed from Strowbridge to himself to be recorded in the patent-office. Strowbridge indorsed and negotiated the note at a bank in Cortland, and obtained the amount called for by the note, less the usual discount. About the time the note matured it was sent to the Valley Bank for collection, and payment refused by Dorr until Strowbridge should correct or explain satisfactorily some further alleged defects in his title, which Dorr claimed had come to his knowledge after the note was given. The president of the bank wrote to Strowbridge, in substance, that Dorr's paper was good, and that Dorr was only waiting for Strowbridge to fix his title. Several letters then passed between Dorr and Strowbridge in regard to the alleged defective title, and, finally, under date of July 30, 1883, Strowbridge wrote to the president of the bank:

"Have just written Dorr, but cannot see anything in his correspondence why you should not receive your pay from him. We certainly have no deal with him at present, and it is for you to get the money as soon as you can. *We certainly must look to you, for our deal closed as soon as you delivered the papers.* If we had wanted his note, what object in sending the papers to you?"

The correspondence between Dorr and Strowbridge in regard to the alleged difficulty in the title was continued for some months after this time, it being insisted by Dorr that a man named Bartholomew had asserted title to the patent for all the New England states, while Dorr claimed that he had bought with the understanding that this territory had not been sold, or only a very small portion of it; but no adjustment of the difficulty was reached, and no further payment made by Dorr, but Strowbridge seems to have collected \$100 from Bartholomew, and credited it to Dorr on the note; and on November 12th he wrote Dorr, in substance, that the balance due was \$314, which he thought was little enough for the patent.

During the spring of 1883 the Des Moines Manufacturing Company, or the firm of C. W. Dorr & Co., composed of C. W. Dorr and Morton Mitchell, which seems to have managed the affairs of the company, sold about 800 machines, parts of which had been made for them by the firm of Freeman & Sons, of Racine, Wisconsin; and the business prospects had so much improved that they proposed to make 5,000 machines for the market of 1884, and in the summer of 1883 a contract was made with Freeman & Sons to manufacture this number of machines. It is difficult to determine accurately from the testimony just who were the parties to this contract, but it seems

to have been negotiated mainly, and the terms settled, by correspondence, some of the letters being signed by C. W. Dorr, and others C. W. Dorr & Co.; the final letter of July 14, 1883, in which the proposition of Freeman & Sons was accepted, being signed by Dorr only. But the proof also shows that both Dorr and Hartwell visited Racine during the summer of 1883, and conducted orally some negotiations connected with the contract. It also appears from the proof that Dorr, or the firm of C. W. Dorr & Co., mainly managed and controlled the business affairs of the Des Moines Manufacturing Company. In the early part of November, 1883, and after Freeman & Sons had made considerable progress toward the execution of their contract for 5,000 machines, they became doubtful of the credit of Dorr, or Dorr & Co.; and were unwilling to deliver the machines to them, and take the risk of making collections from them; and proposed that a corporation should be formed under the laws of Wisconsin, with a capital stock of \$60,000, and that the patent should be conveyed to this company, and that the business of the manufacture of seeders under the patent, and the further execution of the contract for 5,000 machines, should be conducted by such company. This proposal was accepted by Dorr, who seems to have managed the entire negotiation in his own name, and without consulting Mitchell or Hartwell. The corporation was organized, and \$30,000 of the stock of the company was issued to Dorr in payment for the patent, and the patent duly assigned and transferred to the company; Mr. Stephen Freeman becoming the president, Dorr the treasurer, and Charles Freeman secretary, of the company; and the remaining \$30,000 of the capital stock of the company was issued to Stephen Freeman and his two sons, Charles and Michael, for which they gave their notes.

From the time the Racine Seeder Company was so organized the business of the manufacture and sale of seeders under said patent has been conducted in the name of this company, and the company, fearing some difficulty by reason of interference between the Floyd patent and the Strowbridge patent, purchased the former. After the organization of this seeder company the Des Moines Manufacturing Company ceased to make or sell machines, and Dorr purchased Mitchell's stock in the latter company, and offered to purchase the stock of Hartwell, and his offer was accepted by Hartwell, but the proposition was not consummated because Hartwell had pledged his stock, and he was unable to deliver it. Subsequently, Hartwell filed a bill in the circuit court of Polk county, Iowa, against the Des Moines Manufacturing Company and Dorr, charging Dorr with fraud in managing the affairs of said company, and asking the appointment of a receiver to wind up its affairs; and under the proceeding in that case a decree has been entered setting aside the assignment of the Hartwell contract from Hartwell to the company, and transferring the contract back to Hartwell.

After the assignment of the patent by Dorr to the Racine Seeder Company, and the record of such assignment, Hartwell, with the consent of Strowbridge, assigned his contract with Strowbridge to the complainant in the cross-bill; and on January 10, 1885, Strowbridge assigned and transferred to the complainant in the cross-bill the patent in question, together with all rights accruing to him thereunder, and authorized the complainant in the cross-bill to prosecute any and all necessary actions in any courts to annul and set aside any and all transfers theretofore made of said patent.

It is claimed on the part of the complainant in the cross-bill that the assignment of the patent in question was obtained from Strowbridge by the false and fraudulent pretense on the part of Dorr that he was purchasing it for the joint interest of himself and Hartwell, when in fact he was making the purchase without the knowledge of Hartwell, and with intent to defraud him; that the assignment of the patent was sent to the Valley Bank with instructions not to deliver it until the \$500 purchase money was paid; and that the bank, in violation of these instructions, delivered the assignment to Dorr without such payment; and that Dorr thus became possessed of the deed to the patent by his own fraud; and that the Racine Seeder Company is not the purchaser of the patent in good faith, for value; but that the company was only organized to hold the patent and conduct the business of manufacturing under it as a mere convenience to enable Dorr and the Freemans to defraud Strowbridge, Hartwell, and the Des Moines Manufacturing Company.

As to the first proposition, that Dorr led Strowbridge to understand and believe that he was buying the patent for the joint account of himself and Hartwell, there is a conflict of evidence as to what was said between Dorr and the Strowbridges at the time of Dorr's visit to them in the summer of 1882; the testimony of the Strowbridges tending to show that Dorr claimed to be acting for Hartwell as well as himself, while Dorr testifies he did not so represent. I do not find it necessary, for the purposes of this case, to pass upon this conflicting proof, as it is enough to say that no bargain was made between Dorr and Strowbridge until after Dorr returned home to Des Moines, and the letters which passed between the parties are the evidence of what the bargain between them was. In Dorr's letters to Strowbridge he uses the words "we" and "our" as if more than himself were interested, and it is possible enough was said in the previous personal interviews and conversations to lead Strowbridge to infer that Hartwell was included in these words; but when the terms of purchase were finally agreed upon, and Strowbridge, by his letter of November 15, 1882, notified Dorr that he had sent the assignment to the Valley Bank, he said: "*Made the papers to you, and you can do with them as you wish.*" Here seems to me to be a complete answer to all claim that Dorr was buying in the interest of Hartwell, as the entire question as to who should have the benefit of the purchase was relegated to Dorr

to do as he chose with it. No suggestion was made that Hartwell was to be considered in the matter, or his interest protected, and although Strowbridge and Hartwell were old friends, he was not notified or informed by Strowbridge of the sale of the patent, and no steps taken to give him to understand, or inform him in any way, that the conveyance had been made to Dorr; and it does not, as it seems to me, lie in the mouth of Strowbridge, or any one claiming under him, after these utterances, to complain of fraud, because Hartwell has not been allowed to share in the purchase of the patent. It must be remembered that Hartwell had at this time assigned his contract with Strowbridge to the Des Moines Manufacturing Company, although the proof does not show that Strowbridge had assented to such assignment, or even knew of it; and I think it more probable that Strowbridge supposed or assumed that the manufacturing company was to be interested, if anybody in the purchase, rather than Hartwell. But however that may be, the unquestioned fact is that through all the correspondence between Strowbridge and Dorr about this purchase Hartwell's name is not mentioned as a party in interest, and Strowbridge, without instruction or request to do so, from Dorr, makes the deed to Dorr alone.

As to the second point, it is quite clear that Dorr's offer of September 6, 1882, was to pay the royalty on the 175 machines when due, which was the first of the following November, and the balance on July 1, 1883. The payment of the royalty was delayed until March 31, 1883, but when paid Strowbridge accepted it, and accepted the note due on the first of the next July. It is also, as I think, conclusively shown from the proof that Strowbridge knew from some source that the bank had delivered the deed of the patent to Dorr at or soon after the payment of the money and the signing of the note of March 31st, because Strowbridge's letter to the bank, of July 30th, clearly shows that he knew the deed had been delivered by the bank to Dorr, and he assumes that the bank had thereby made itself liable to pay the note. It is true that Mr. Strowbridge testifies that he had no knowledge that the deed had been delivered by the bank to Dorr until November, but this letter of July 30th seems to me unanswerable upon this question, and I have no doubt Strowbridge did know of the delivery of the deed to Dorr very soon after the fact occurred. By the delivery of the deed to Dorr he was clothed with all the evidence of title to the patent which Strowbridge could give him, and he (Strowbridge) must have understood and known, for he seems from the testimony and letters to have been an unusually intelligent and capable business man, that he had only Dorr's note to rely upon for payment of the balance of the purchase money due him. Strowbridge must have known, as I have said, that the deed had been delivered to Dorr; and yet he took no steps to recover it, or prevent Dorr from making such use as he (Dorr) should see fit, and allowed Dorr to stand as the apparent owner until November, 1883, when Dorr conveyed the title

to the Racine Seeder Company, and that company has held the title since that time. The fact that the Racine Seeder Company was organized for the purpose of taking the title to this patent, or with the understanding that it was to take the title to the patent, and from that time conduct the business of manufacturing under the patent, and that it paid for the patent by the issue of half its capital stock to Dorr, is no evidence of fraud or bad faith as against the seeder company. Having become a corporate entity with power to contract debts and liabilities and to conduct business, this Racine Seeder Company stands in the same position that an individual would stand in who had purchased this patent from Dorr in good faith. It seems to me that even if the bank did disregard Strowbridge's instructions, and deliver the deed without requiring the payment of purchase money, instead of holding the deed as collateral to Dorr's note, Strowbridge knew of this action of the bank, and elected to take his chance of collecting the note from Dorr. In other words, he treated the note as payment as far as the delivery of the deed was concerned, and cannot be allowed, even as against Dorr, to treat the deed as having been obtained by such fraud as would vitiate it in Dorr's hands. It is possible that if, while the title remained in Dorr, Strowbridge had taken his steps to establish a vendor's lien on the patent he might have done so; but he neglected to do this, and allowed Dorr to deal with the patent as its absolute and unconditional owner, and, so dealing with it, Dorr has conveyed it to a corporation competent to purchase and hold it, and that corporation has paid value for it in stock.

The proof shows that on August 16, 1883, Dorr wrote Strowbridge that nobody was responsible for the note but himself, and that if he (Strowbridge) would perfect the title he would pay the note; and the payment of the note and adjustment of the title was the subject of correspondence between them until two months before this litigation began, Dorr refusing to pay unless Strowbridge would first correct alleged defects in the title growing out of the Bartholomew claim to New England, and a disclosure that several counties in Iowa had been sold, of which, as was claimed, Strowbridge had not informed Dorr prior to the purchase; so that when, in November, 1883, Freeman & Sons, not being content to trust Dorr and his associates, if they knew he had any, to the extent of the 5,000 machines they had agreed to make, proposed that a corporation be formed, and the patent conveyed to it, I can see no ground upon which Strowbridge can complain of fraud in the transaction, as he had allowed Dorr to hold the title to it without question as to its validity in his hands, and his only claim was that there was a balance of \$314 of purchase money yet due him, for which Dorr was personally liable, and which, for aught that appears, could have been collected by suit on the note. What title Strowbridge had seems to me to have been regularly and

properly vested in the Racine Seeder Company, and that company's title made a matter of record in the patent-office nearly two years before the complainant in the cross-bill obtained its conveyance from Strowbridge.

I come now to consider the question of the title of the complainant in the cross-bill as the assignee of the Hartwell contract with the consent of Strowbridge. By a decree of a competent court the Hartwell assignment to the Des Moines Manufacturing Company has been set aside, and he has been rehabilitated with the ownership of the contract, and this court cannot review that decree; but the Racine Seeder Company was not a party to the decree, and is not bound by it. Without discussing the question as to whether the contract between Strowbridge and Hartwell is a power of attorney coupled with an interest, and therefore not revocable except for some of the reasons provided for in the instrument itself, I am very clear that the contract, both as a power to sell and as a license, is a merely personal one, and not transferable by Hartwell except with the consent of Strowbridge. *Curt. Pat. § 198; Brooks v. Byam*, 2 Story, 545; *Consolidated Fruit Jar Co. v. Whitney*, 1 Ban. & A. 356. In view, then, of the nature of this contract, I am quite clear that when Strowbridge parted with his title to the subject-matter of the contract he parted with all right to sanction or vivify the assignment, or transfer of it from Hartwell to any one else; and conceding for the argument that the contract remained in force, and that the sale of the patent from Strowbridge to Dorr did not work a revocation of it, Hartwell could not sell territorial or shop rights, nor assign the right to manufacture, without the consent of the owner of the patent; and holding, as I do, that Strowbridge's deed to Dorr was operative to transfer the title in the patent to Dorr, and that the deed from Dorr to the seeder company placed the title in the seeder company, it follows that no transfer of the contract by Hartwell was valid without the consent of the seeder company.

Much of the testimony and discussion has related to the charge that Dorr was guilty of bad faith towards the Des Moines Manufacturing Company, and towards Hartwell and Mitchell, his associates in that company, in organizing the Racine Seeder Company, and transferring to it the business of the Des Moines Company and the Strowbridge patent; but these are questions which I deem wholly foreign to this case, and only proper to be considered in a suit by the Des Moines Company against Dorr or the Racine Company. If Dorr wronged the Des Moines Manufacturing Company or his associates, Hartwell and Mitchell, that wrong cannot aid the title which the Joliet Company now asserts by its cross-bill against the Racine Company. The Joliet Wire-check Rower Company must stand upon the title it got by the deed from Strowbridge and the assignment of the Hartwell contract, and as Strowbridge had no title when he made the deed to

that company, and the transfer of the Hartwell contract is not approved or assented to by the Racine Company, it follows that the complainant in the cross-bill took no title from either of these sources.

A decree will be entered dismissing the cross-bill for want of equity; and dismissing so much of the original bill as relates to the Floyd patent without prejudice; and finding under the original bill that the Strowbridge patent is valid, and the title thereto is in the complainant; and that the defendant, the Joliet Wire-check Rower Company, has infringed the same; and that complainant is entitled to an accounting for profits and damages.

CONSOLIDATED FRUIT JAR Co. v. BELLAIRE STAMPING Co.

(Circuit Court, S. D. Ohio, E. D. April 13, 1886.)

1. PATENTS FOR INVENTIONS—ABANDONMENT.

The patent granted to William Taylor and Charles Hodgetts, No. 117,236, dated July 18, 1871, for improvement in caps for preserve jars, is invalid and void.

2. SAME—RENEWING APPLICATION—AUTHORITY—ASSIGNMENT.

Taylor & Hodgetts filed their application March 26, 1856. It was rejected, on references, April 16, 1856, and withdrawn April 22, 1856. On March 30, 1869, a patent was granted to Boyd for substantially the same invention. On January 7, 1871, Cozzens, the attorney of Boyd, filed a request in the name of Taylor & Hodgetts, but without their authority, to renew the application under the provisions of section 35 of the patent act of July 8, 1870. In June, 1871, Boyd purchased Taylor & Hodgetts' rights in the invention and application, and obtained from them a ratification of Cozzens' attempted renewal, after which he paid the renewal fee, filed an amended specification, and had the patent issued. Taylor & Hodgetts made no effort to renew or prosecute the application between their withdrawal on April 22, 1856, and the filing of the renewed application in 1871. There was evidence that they had given up the invention, and ceased to use it, or take any further interest in it, as early as about 1862; and that they were men of means, engaged in the business of manufacturing fruit cans. *Held*, (1) that they had abandoned the invention; (2) that the renewal was without authority, and that its subsequent ratification could not validate it; (3) that their abandonment was not in favor of Boyd, the intervening patentee, but in favor of the public; (4) that Boyd could not, by acquiring an assignment from them, reclaim the invention from the public.

3. SAME—LAPSE OF TIME.

Where an application for a patent has been filed and withdrawn, lapse of time, whether it be alone conclusive of abandonment or not, is nevertheless a fact which may give great point and force to testimony disclosing what was done in the interval.

4. SAME—INTEREST OF PUBLIC—ESTOPPEL.

In cases of abandonment or reissue, under the patent laws, the matter is not to be likened to chattels personal, the ownership of which may be abandoned and afterwards resumed; for there is always, in patent cases, a public equity which must not be disregarded. In such cases the equitable estoppel which arises, where other rights in the mean time intervene, is not in favor of the intervenor alone, but he is regarded by the courts as the representative of the public, and therefore whatever rights he gains the public gains

Causten Brown, William C. Witter, William H. Kenyon, and A. C. Gurlitz, for complainant.

George W. Dyer and Lysander Hill, for defendant.

SAGE, J. This suit is to restrain the infringement of two patents, the property of the complainant: (1) Taylor & Hodgetts' patent for an improvement in caps for preserve jars, No. 117,236, dated July 18, 1871. (2) Reissued patent No. 9,909, for means for preventing corrosion of metallic caps, issued October 25, 1881, to the complainant, assignee of Lewis R. Boyd, deceased, to whom the original patent (No. 88,439) was issued March 30, 1869, for improved mode of preventing corrosion in metallic caps.

Taylor & Hodgetts' original application for their patent was made March 26, 1856. It was rejected, on reference, April 16, 1856. April 22, 1856, Taylor & Hodgetts withdrew it, and requested a return of \$20, as then provided by statute in such cases, and about May 1, 1856, the money was returned to them.

The statute of July 8, 1870, (section 35,) provides for the renewal of rejected or withdrawn applications by a renewed or new application, if made within six months, which period expired January 7, 1871. On that day S. D. Cozzens, signing as attorney for Taylor & Hodgetts, but, as I find from the testimony, without authority, filed a petition that they might be allowed to renew their said application in accordance with the act of July 8, 1870, upon paying into the treasury the sum of \$15, as in the case of a new or original application. On the fourteenth of January, 1871, Cozzens was notified by the commissioner of patents that as he had no recorded power of attorney, as required by the regulations of the patent-office, authorized by the act of July 8, 1870, the paper above referred to, filed January 7, 1871, and signed by him, could not be accepted as a valid renewal of Taylor & Hodgetts' application. On the thirtieth day of June, 1871, Cozzens procured from Taylor & Hodgetts a full power of attorney in writing to renew said application. The first paragraph of this power is a recognition of what he had previously done. The language is significant in its bearing upon the question whether any authority whatever had been previously given him. It is as follows:

"Whereas, on the seventh day of January, 1871, a certain paper for the purpose of renewing, under the patent act approved July 8, 1870, our application for letters patent for an improvement in preserve cans, filed March 26, 1856, and withdrawn May 1, 1856, was duly filed in the patent-office by S. D. Cozzens, Esq., of the city of New York, as our attorney, and was by him subscribed as our attorney, as he rightfully might do."

In the body of the power there is an express ratification of Cozzens' action in signing and filing the petition for leave to renew the application.

It is convenient now to consider what Taylor & Hodgetts did with reference to their claim for the invention described in their original application, after its rejection and their withdrawal of it. They were tinsmiths. The copartnership was in existence from about 1855 un-

til the death of Taylor, in April, 1874. They were for several years, dating from about 1855, largely engaged in the manufacture of fruit cans at Williamsburg, New York. Hodgetts' testimony, taken in 1875, in a cause then pending in the Northern district of Illinois, is, by stipulation, a part of the record of this cause. From his deposition it appears that they were in very good pecuniary circumstances between the years 1860 and 1870. They continued in business as partners as above, at Williamsburg, until Taylor's death. In 1855 they manufactured and sold, in large numbers, a fruit-jar cap identical in material and form with that described in their application of 1856, excepting that it was unlined. They also manufactured and sold a fruit-jar cap differing from that described in their application only in that there was no soft metal cover to what is described as the "lining" in their application. Whether they manufactured and sold caps such as are described in their original application is not clear. There are some expressions which indicate that they did, but Hodgett's testimony on this point is unsatisfactory. He was evidently an ignorant man. His testimony was given nearly 15 years after they discontinued the manufacture, and his memory as to dates and as to details was defective.

John H. Goodale, who was in the employment of Taylor & Hodgetts at the time, and in charge of that department of their business, testifies that they sold caps of all the varieties above referred to, including that described in their first application, for about three years, dating from 1856 or 1857; but he refers particularly to the two kinds not described in the application, and his only testimony including the cap described is an affirmative answer to a question whether Taylor & Hodgetts sold caps of all these three varieties. His deposition, which is in the record by stipulation, was taken in 1878 in the cause in the Northern district of Illinois.

Two witnesses, Renshaw and Jones, who were in the employ of Taylor & Hodgetts, made affidavit that caps like those described in the original application were made and sold at the dates above referred to by Taylor & Hodgetts, but subsequently each made an affidavit that he was in error, and that no such caps were made or sold. All these affidavits are in the record by stipulation. Taken altogether, the testimony on this point is so contradictory, vague, and unsatisfactory that it is not sufficient to warrant the conclusion that the caps described in the original application were ever manufactured and sold by Taylor & Hodgetts.

Mr. Hodgetts was examined fully in reference to the abandonment of the invention described in the Taylor & Hodgetts' application of 1856. As above stated, he testified that his firm commenced the manufacture of caps a little before 1857, and continued about three years. He was asked what they did about the invention after those years. His answer is that they abandoned it; and he goes on to say that after that time they made no efforts to get a patent for it, because they thought it was not worth it; that between 1860 and 1870

the pecuniary circumstances of his partner and himself were very good, but that in all that time they had no idea of getting a patent, and the subject was not even talked about. He further testifies that they discontinued the manufacture and sale of caps and jars in 1862, because the improvements that were introduced "shut off that line of business;" and "that the thing became so worthless to us that we never thought about it." On cross-examination, when asked what he meant by his testimony in his direct examination that he abandoned the invention, his answer was that he gave it up,—that they stopped making them. Finally, he says, that about three years before the date of his testimony his partner informed him that he had an offer of \$100 for their claim to the invention. This offer was from some person who was "after the claim," but who he was the witness did not know. Both he and his partner were willing to accept the offer, and the sale was made. The witness received \$50, and supposed that his partner received a like sum. The purchaser was Cozzens, who, on the same day, received the power of attorney heretofore referred to.

To the respondent's contention that by this testimony an abandonment of the invention is established, complainant urges—*First*, that Hodgetts' testimony is not reliable because of his ignorance and forgetfulness; that he is confused about dates and details; that he testifies that he does not remember anything about the original application for the patent; and that, taken altogether, his testimony is so vague and uncertain that it should be discarded. That is not my view. On the contrary, these very characteristics add strength to his testimony that they gave up the idea of pressing an application for a patent, and abandoned the invention as worthless. No man is likely to forget facts in which he has a constant and lively interest. Very few men remember, for any great length of time, facts to which they are indifferent; and Hodgetts' inability, after the lapse of nearly 15 years from the date of their last manufacture, and 20 years after the rejected application, to recall details or dates with accuracy is not at all surprising, if it be true, as he testifies, that he and his partner abandoned the invention, and threw it aside as worthless. No one can read Hodgetts' testimony without being impressed that it was honestly and truthfully given. He had no interest in the result of the litigation. He and his partner had sold whatever claim they had for a mere trifle, and that fact strongly re-enforces his testimony that they had abandoned the invention, as does the further fact that it does not clearly appear that after the rejection of their application they ever manufactured or sold a single cap such as that which they had sought to have patented. What more significant and conclusive proof of the truth of his testimony that the thing became so worthless to them that they never even thought of it?

Next, it is insisted that even if it be true that they dismissed the idea of obtaining a patent, and, even for so long a period as 15 years, regarded as worthless what they described in their application, there

was no abandonment, for the reason that in the proper construction of the thirty-fifth section of the act of July 8, 1870, mere lapse of time is not sufficient to establish an abandonment. Grant it for the sake of the argument. The answer is, first, that lapse of time is nevertheless a fact which may give great point and force to testimony disclosing what was being done in the interval. Here were men largely engaged in manufacturing fruit cans and caps, and it is incredible that they would, at such a time and under such circumstances, utterly neglect either to press for a patent or engage in the manufacture and sale of what they regarded an improvement over the other caps they were manufacturing and selling; and when they allowed 15 years to slip by, and did nothing, and then, cans having in the mean time been largely superseded by glass jars, and their style of cap practically out of date, to such an extent that there is no evidence that a single cap made according to the Taylor & Hodgetts' claim has ever since been made and put upon the market, the lapse of time makes conclusive the fact of abandonment, not merely of the application, as was argued, but also of the invention.

Again, it is said that abandonment is a renunciation of ownership, and that if thereupon the property pass into the possession of others, the ownership is gone forever; but that where the abandonment is to oblivion or neglect, the ownership may be reasserted after any lapse of time.

The owner of property may abandon it on a desert, and, turning back, retake it into his possession, and it will be his again. Even in that case, it was not his after he threw it away until he retook it, and yet he could make it his by retaking it, and then his title was as good as ever. But we are not dealing with that kind of property. The patent laws protect the exclusive right of an inventor; but the great object of those laws is to benefit the public by stimulating invention, which it is the theory of the law can be best accomplished by securing to the inventor, for a limited time, under enacted conditions, an exclusive right to the manufacture, use, and sale of his invention, thereafter to be forever free to the public. Hence, in a case of abandonment or reissue, the matter is not to be likened to rights to chattels personal, for in reference to patents there is always a public equity which must not be disregarded. But for this public equity, in a case of reissue broadening the claim within the limits of the invention, the rights of an intervenor, who had in the mean time appropriated what had been inadvertently or by mistake or accident omitted from the claim, might be saved by granting the reissue, subject to a license to the intervenor; but applying the public equity, the court must regard the intervenor as the representative of the public, and therefore whatever rights he gains the public gains. So in abandonment. If it appears that the inventor, after perfecting his invention and applying for a patent, and thereby irretrievably committing himself to the proposition that his invention is ripe for introduction to the public, ac-

cept the decision rejecting his application, and cast aside his invention as of no longer any value to him, he thereby makes it forever public property, and it is not in his power to take it back and make it again his own.

In *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, and in *Planing-machine Co. v. Keith*, 101 U. S. 479, there is abundant authority for holding that, upon the facts disclosed in this record, Taylor & Hodgetts abandoned their invention before the renewal of their application; and the holding of this court is that the patent issued to them is therefore invalid. I do not deem it necessary to refer particularly to the rulings made in the circuit court of New Jersey, and in the Western district of Pennsylvania, in the cases cited sustaining the Taylor & Hodgetts patent. Those rulings were on motions for preliminary injunctions, and the judges who pronounced them would have decided upon final hearing, as I do, entirely independently of them, for obvious reasons.

There is another view to be taken. It is clear to my mind, from the testimony, that Cozzens, in presenting the renewed application for the Taylor & Hodgetts patent, on the very last day of the time limited by the act of July 8, 1870, acted without authority. The language of the power of attorney subsequently obtained by him strongly implies this, and all the circumstances confirm it. This subsequent ratification, of date six months after the limit of time within which the new application could, under the law, be made, did not, and could not, divest vested rights intermediately accrued. The rights of Boyd under his patent of March 30, 1869, and the rights of the public, had then accrued, and they were vested rights. In *Mann v. Walters*, 10 Barn. & C. 626, BAGLEY, LITLEDALE, and PARKE held that where a notice to quit is given by an agent of a landlord, the agent ought to have authority to give it when it begins to operate, and that a subsequent recognition of the authority of the agent will not make the notice good. A similar ruling was made by Lord DENMAN in *Eysster v. Goldwin*, 2 Q. B. 143; and in *Stoddard v. U. S.*, 4 Ct. Cl. 511, it was held that ratification after capture, of purchases of cotton by an agent in an insurrectionary state, during the rebellion, comes too late, and that the law does not admit of a ratification which will defeat the intervening rights of third parties, and that it does not matter whether the third party is an individual, a corporation, or the government of the United States. In *Wood v. McCain*, 7 Ala. 800, COLLIER, C. J., states the rule as follows:

"Now, although the general rule of law is that the ratification relates back to the inception of the transaction, and has a complete retroactive efficacy, or, as the maxim is, *omnis ratihabitio retro trahitur*, yet this doctrine is not universally applicable. Thus, if third persons acquire rights after the act is done, and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights."

This rule was recognized in *Cook v. Tullis*, 18 Wall. 332, and it is directly applicable here.

It follows that the renewed application of Taylor & Hodgetts was not made in time, and that their subsequent ratification of Cozzens' unauthorized appearance did not relate back to the date of that appearance. This disposes of the Taylor & Hodgetts patent.

The Boyd patent, reissued to the complainants, dates from March 30, 1869. In the pressure of other business since the close of the argument in this cause, a week ago, I have not been able to examine fully the questions necessary to a decision. I shall therefore postpone my decision as to that patent until the opening of the June term of the Eastern division, at Columbus, where this cause is pending, and where the final decree will be entered. But that patent expired at the close of the twenty-ninth of March, 1886, and is no longer in force.

The restraining order hereinbefore granted is removed, and no further order will now be made.

YOUNG and others v. LEHMANN and others.

(District Court, S. D. New York. April 30, 1886.)

1. CARRIER OF GOODS BY SHIP—DELIVERY OF IRON CARGO—WHARF BREAKING DOWN—WEIGHING—CHARTER-PARTY.

Though a ship as a common carrier where she selects her own wharf is answerable for its sufficiency until the lapse of a reasonable time for removal of the goods by the consignee, including the necessary custom-house weighing and gauging, the ship is not responsible for the breaking down of a wharf apparently sound and in good condition, selected by the consignee in accordance with the provisions of the charter, when the breaking down occurs through secret defects, of which the ship has no notice, and the evidence does not establish any unusual or excessive deposit of cargo for a sound wharf.

2. SAME—CASE STATED—SHIP'S AGENTS, WHEN AGENTS OF CHARTERERS.

The ship S., under a charter to the respondents, was loaded with spiegel iron "to be delivered at New York, at such wharf or place as may be ordered by the consignee on arrival." The consignees finding it difficult to obtain a wharf for spiegel iron, requested the local ships' agents to find a wharf, which they did. The ship began to discharge there, dumping the iron in a pile, from which it was distributed as fast as it could be weighed. A part of the wharf, 30 feet by 20, where the pile was, gave way, and a portion of the iron not distributed slid into the river. The timbers and supports of the wharf proved to be decayed and rotten. *Held*, that the charter imposed upon the consignee the duty of finding a suitable wharf for the discharge, that the ship's agents in selecting the wharf in question upon the consignee's request acted as the agents of the respondents, and that the selection made was legally the charterers' selection, and not the ship's; and the evidence not showing either notice of unsoundness to the ship or an excessive or unusual accumulation of iron, *held*, that the ship was not answerable for the loss.

In Admiralty.

E. B. Convers, for libelants.

Jas. K. Hill, Wing & Shoudy, and *H. Putnam*, for respondents.

Brown, J. On the fourth of June, 1880, about 1:30 p. m., while the libelants' ship *Stranton* was discharging a cargo of spiegel iron

upon the dock at the foot of Noble street, Williamsburgh, a portion of the pier, about 30 feet long by 20 feet in width gave way, and 93 tons of spiegel iron slid into the water. Seventy tons were recovered; the other 23 were lost. The respondents, claiming that the loss was through the fault of the ship, retained from the freight the sum of \$1,145.31, to recover which this libel was filed.

The right to recover depends upon the question whether the ship was in fault by reason of her negligence; or, if not negligent, whether she was liable for the loss as a common carrier. The ship was chartered to the respondents to bring a cargo from England to New York, "the freight to be paid at the rate of 14 shillings per ton upon the right delivery of the cargo * * *" at "such wharf or place as may be ordered by the consignee on arrival." Neither the charter-party nor the bill of lading contained any other provisions material to the case.

The provision in the charter that the iron should be delivered "at such wharf or place as may be ordered by the consignee on arrival" was not a mere privilege of the consignee; it also imposed a duty upon him to provide a suitable wharf. It is well known that many wharfs in this port are unfit to receive a heavy cargo like iron, and there is often more or less difficulty in obtaining a suitable place for discharge. This clause of the charter I must regard, therefore, as intended in part to relieve the ship from the burden of finding a suitable wharf, and to impose that duty upon the consignee. Before the arrival of the vessel the respondents found there was likely to be difficulty in obtaining a suitable berth for such a cargo, and they therefore requested the ship's agents in this port, who were better informed in regard to such matters, to select a wharf. They accordingly selected the wharf in question. The ship went there, and gave timely notice to the respondents of her readiness to discharge. The wharf was one at which iron had been accustomed to be discharged; and in external appearance it was sound, even, and suitable for the purpose, though more newly repaired at the outer end. The evidence showed that at the place where it gave way the main rafter and some uprights were decayed and rotten. The planks were not broken, but when the rafter gave way the iron upon this portion of the wharf slid off into the river. The outer end of the wharf, about 30 feet in length, was of solid crib wood. Inside of that the planking of the wharf was laid upon rafters supported by piles,—the usual and necessary mode of constructing wharves in the East river.

The discharge of cargo commenced at 7 o'clock on the morning of the 14th from hatches 3 and 2, which were respectively about 60 and 150 feet from the end of the pier. The United States weigher was present to weigh the iron as it came upon the dock at 7 o'clock, or a little after. Up to the time the wharf gave way about 150 tons had been landed. As fast as it was weighed the iron was distributed on various parts of the dock, from the extreme end of the pier along a

space of 250 feet towards the shore. None of the iron that had been weighed and distributed went into the river. As discharged from the tubs by which it was raised from the vessel the iron was dumped along-side, forming a conical pile, from which it was taken to be weighed and distributed. It was at this point that the wharf gave way. It was only what was in the pile waiting to be weighed and distributed that went into the river.

By a statute of the United States (Rev. St. § 2882) it is unlawful to remove such goods from the pier until they are weighed by the proper officer. The duty of the ship to make a "right delivery" includes a delivery at a place where the goods can be weighed; and her liability as carrier continues until a reasonable time has elapsed for that purpose, and for the subsequent removal of the goods by the consignee. If not suitable for that purpose and for that period, the wharf is not a suitable place of delivery. *Tielman v. Plock*, 17 Fed. Rep. 268, affirmed 21 Fed. Rep. 349. Except for some stipulation in the charter-party or bill of lading, the liability of the ship as a common carrier, and as insurer of the goods, for the sufficiency of the wharf selected by her, must continue during that interval. That time had not elapsed in this case when the wharf fell; and, accordingly, if the responsibility for the selection of the wharf had rested upon the ship, she must have been held answerable for this loss without regard to any question of negligence, or of overloading the part of the pier that fell. See *Vose v. Allen*, 3 Blatchf. 289; *The City of Lincoln*, 25 Fed. Rep. 835, 839; *McAndrew v. Whitlock*, 52 N. Y. 40.

The ship was not in this case responsible, however, for the dock selected, nor was the selection made by her. The ship's agents, in acting upon the request of the respondents to select a dock, acted in behalf of the respondents in the discharge of the duty devolving upon the latter under the terms of the charter. For that purpose the agents were the respondents' agents, and the selection of the Noble street dock was, in law, the respondents' selection. The agents did not represent the ship in that selection, and had no authority to vary the terms of the charter. The vessel, therefore, was not an insurer of the sufficiency of the wharf for any period whatever, nor responsible for its secret defects, or for any loss arising from the use of it, unless that loss arose from some unreasonable or improper use of the wharf, such as overloading or an improper distribution of cargo; in other words, for her own negligence.

The wharf having been selected in effect by the respondents, and being a wharf also where cargoes of iron were accustomed to be landed, and being in external appearance sound and fit for such a cargo, the master of the ship, and the stevedore employed by him, having no notice of any secret defects, had the right to assume that it was a sound wharf, and a suitable place for the landing of the cargo in the customary manner. They were in no fault so long as they discharged the iron in the usual way, and, having no notice of any

defects, avoided any unusual piling that could be deemed excessive for a wharf presumptively sound. Judged by this rule, no negligence in the use of the wharf can be imputed to them. The testimony of the witnesses on the part of the ship, given before the amount of iron taken from the water was known, must, no doubt, be greatly modified. Their estimates of the weight of iron on that part of the pier which gave way turns out to be only from one-half to one-third of what it actually was. There is no question, however, but that the iron was well distributed as fast as it was weighed, and that the weigher was in attendance all the time. As the iron was discharged faster than it was weighed, there was a gradual accumulation of iron near the scales. But the evidence does not show that the accumulation was excessive or unusual. The respondents' evidence shows that the amount was 93 tons upon a space about 20 feet by 30. The carpenter estimated that the strength of the timbers that supported this part of the wharf, if sound, would be 200 tons. There is no evidence to contradict this estimate. Aside, however, from this evidence, the custom-house weigher called by the respondents must be regarded as a disinterested witness. He testified that he had seen five times as much iron upon that wharf, and, near the conclusion of his testimony, he says: "I do not think this wharf was loaded unusually. If sound, it would not have broken. The pile was not unusual in height or extent. This dock had a good character. It was a city wharf, and thought to be a good one." Upon this evidence I am not warranted in holding that the ship was in any fault in her use of the wharf, or that the pile at the scales was unusual or excessive for a sound wharf, or that the master of the ship had any reason to suppose the wharf was weak, or not able to sustain the weight that a sound wharf would have borne without injury.

The libelant is entitled to a decree for the amount claimed, with interest and costs.

THE SOUTH AMERICA.

MAGOWAN *v.* ANDREWS and another. (*Libel in Personam.*)

ANDREWS and another *v.* THE SOUTH AMERICA. (*Libel in Rem.*)

(*District Court, D. Delaware. April 24, 1886.*)

1. CHARTER-PARTY—RULE OF CONSTRUCTION.

In the absence of fraud or misrepresentation in the inception of a charter-party, the owner and charterers must be governed by its express terms.

2. SAME—SEAWORTHINESS—IMPROPER STOWAGE.

A. & L. hired a barge from its owner for the special purpose of carrying stone from any place on the Delaware river to the breakwater in Delaware bay. After she had been loaded for her second trip with about 700 tons of

stone, a large portion of which was placed on deck, and the balance beneath the hatchways without being distributed evenly over the bottom, and while being hauled out into the main channel of the river, the wind and tide being strong from the S. W., she careened, and went over on her beam ends, losing all of the deck-load, and drowning four of the crew. *Held*, on the proof, that the accident was caused by the careless, negligent, and unskillful loading and stowing of the stone by the charterers and their servants, and that the owner was not liable for any loss or damage on his warranty of seaworthiness.

3. SAME—PERIL OF THE SEA.

On her last trip, after arriving at the breakwater, and while discharging cargo, the barge sprung a leak, and was towed towards shore, sinking in 21 feet of water. *Held*, on the proof, that the leak was caused by the scraping of the stones down the side of the boat when unloading, whereby one of the bottom planks was started, and as the charterers had taken no precautions to protect the sides, or in any manner to guard against such a result, they must abide the consequences. In no sense can a loss arising from such a cause, and under such circumstances, be attributed to a peril of the sea, or to the unseaworthiness or faulty construction of the boat.

In Admiralty.

Levi C. Bird, for libellant.

J. H. Hoffecker, Jr., for respondents.

WALES, J. These are cross-libels on the same charter party, and may be considered together, the testimony taken in the first case being applicable to both. Andrews & Locke, having a contract with the United States to deliver 30,000 tons of stone at the Delaware breakwater, on or before the thirtieth of June, 1885, chartered the barge South America from Robert A. Magowan, its sole owner, for the special purpose of carrying the stone from Wilmington, or any other place on the Delaware river, or its tributaries, to the breakwater, for the term of six months from the first day of January, 1885, at the rate of \$400 per month, payable monthly; and with the reserved right to Andrews & Locke to renew the charter-party after the expiration of that term, from month to month, at the same rate, until the end of the year. Neither tonnage nor measurement is given in the charter-party, but the proof shows that the barge is 170 feet in length, 23 feet and 9 inches on top and 20 feet at bottom in breadth, and 13 feet 9 inches in depth. The hatchways are 6x8, with the exception of one, which is 14x8.

The owner stipulated to keep her in good repair, and the charterers agreed to return her at the expiration of the contract "in condition as when chartered, necessary and usual wear, tear, stranding, sinking, or the perils of the sea whatever accepted," either at Wilmington, Havre de Grace, or Philadelphia, as might be designated by the owner. The charterers were also to furnish officers and crew, and all needful appliances, not expressly stipulated for, for loading and unloading, and to pay the expenses of running the barge. Andrews & Locke took possession of the barge on the first of January, 1885, and after fitting her out with engine, cranes, and other apparatus for hoisting, brought her to the railroad pier on the Delaware to receive her first cargo. Here she was detained by an ice

blockade until the eleventh of March, when she carried the first load of stone, consisting of about 700 tons, of which about 250 tons were placed on deck, "it being found," as alleged in the libel of Andrews & Locke, "impracticable and unsafe to load her otherwise." The charterers further say that, owing to the necessity for handling the stones so many times in loading in the hold and unloading therefrom, it was found utterly impossible to make as many trips per month as were desired, and it was not until the fifth of April that she was loaded for the second trip. On this occasion, as alleged, at the suggestion of and under the supervision of Magowan, the charterers put a larger load (325 tons) on her deck than before, and 428 tons in her hold. She was then taken in tow by a tug, and hauled out into the river at a distance of about 500 feet from the end of the pier, and, when the tug started to straighten the barge in the main channel, the force of the current and a strong S. W. wind caused her to careen, and all the stone and other movable property on deck were lost overboard, and four of the crew drowned. After she had been righted and repaired the barge carried three more cargoes, to-wit: One on the fifteenth of May, of 750 tons, of which 250 tons were on deck; one on the twenty-eighth of May, of 750 tons, distributed in the same way; and one on the ninth of June, of 688 tons, of which about 250 tons were on deck. On this last trip, after arriving at the breakwater, and while discharging cargo, it was discovered that the barge had sprung a leak. She was immediately towed toward shore, and sank near the government pier. The agents of the companies which had insured the barge for the owner took possession of her within a day or two after the sinking, pumped her out, and towed her to a ship-yard at Wilmington for repairs, from which time the charterers ceased to have any actual possession of the boat. The same companies had, through their agents, temporary possession of the barge while undergoing repairs after the accident on the fifth of April.

Andrews & Locke claim damages for losses sustained by reason of the unfitness of the barge for the special purpose for which she was chartered, and of the fraudulent representation of the owner that she would carry 600 tons of stone on deck, by which they were induced to enter into the charter-party. In consequence of delay in loading and unloading they were obliged to get an extension of their contract with the government, and to construct, at great expense, barges better adapted for their purpose. Magowan sues for the recovery of the monthly payments from April to December, inclusive, with interest on each from the time it was due. The charter-party contains no warranty or representation of the capacity of the barge, or of the quantity or manner of carrying a cargo. She is described as "stanch, sound, and seaworthy," and it is stipulated that the owner will provide certain chains, anchors, and mooring lines. Magowan denies having guarantied orally or in writing that the barge would carry 600 tons on her deck. He had no knowledge or experience

on the subject. His boat was new,—had never before been used. She was well built, of the best materials, at a cost of \$20,000. Locke had frequently examined her at Havre de Grace, where she was built, and on one occasion had brought with him an expert from Baltimore, and they had measured her inside and outside. Locke admits that he took Capt. Henry to Havre de Grace “to get his judgment in regard to what she would carry altogether,—as to what her tonnage would be.” Locke’s statement that Magowan assured him the barge would carry 600 tons on deck is denied by the latter, and is uncorroborated. The fair inference from the conduct of Locke in seeking the opinion of Capt. Henry is that he did not depend on anything that was said by Magowan in relation to the capacity of the barge, and that he was not induced thereby to enter into the charter-party. There was no concealment or misrepresentation on his part. Andrews & Locke knew as much as he did about the carrying capacity of the boat, and, in the absence of any proof of fraud in the inception of the charter-party, both parties must be governed by its express terms or stipulations.

The charterers contend that the careening of the barge off the railroad pier was the direct or immediate result of her faulty construction; that she was cranky, top-heavy, unfitted for carrying any cargo, and therefore unseaworthy. The testimony on this point is very voluminous, but a careful examination of the evidence has convinced me that the cause of the mishap in April was the unskillful and careless loading of the barge. The testimony of the master, Wills, and of the marine inspector, Crowell, leaves no room for doubt that had the cargo on the fifth of April been properly stowed, with two-thirds in the hold and one-third on the deck, or half and half, the accident would not have occurred. The stones weighed from one to three tons each, averaging one and a half tons. Wills says that it was difficult to get them into the hold, they were so large. He put them in the hold, stowing as best he could under the circumstances, and had about half the load on deck. “That was what he aimed to do.” “The stones were very heavy and irregular in shape.” To the question, “(9) Was or not this barge when so loaded, on this occasion, in your judgment, top-heavy?” he replies, “Yes, sir.” “(10) Was or not that the reason largely, in your judgment, why she careened?” *Answer.* Yes, sir. “(11) Was she or not, in your judgment, for the purpose for which she was then being used, unseaworthy? A. If I could have got those stone in her hold she would have been all right; under the circumstances, she was not. The stone were in such shape that you could not stow them in her hold to load her.” “(14) Then, how could she carry the load? A. We stacked them up on her all the same.” “(18) Then, in your judgment, if you could have gotten a larger portion of her cargo in her hold and less on her deck, you think she would not have been top-heavy. A. No, sir; she would not have been top-heavy. (19) Do you think she could have carried

a larger cargo on deck than she did in safety? A. Yes, sir; by stowing the hold properly, she could." Such is the testimony given by the master, a witness called by the charterers on his direct examination. He was in charge of the boat from January to the fifth of June, and the loading was under his sole charge and direction.

Capt. Crowell, a witness for the owner, a marine surveyor of 13 years' experience, inspected the barge before and after she was launched, as agent of the insurance companies. He considered her sound, staunch, and seaworthy, and fit to carry any cargo if properly stowed. He saw her at the railroad pier while lying on her beam ends, and "found the stone was placed in the hatchways, and between the hatches and in the bilges there hadn't been any stone; and a large deck-load made her top-heavy." It was his opinion "that if the barge had been properly stowed,—the cargo in it properly stowed and carried out to the sides, and between the hatches,—with the number of tons she had on deck, she would not have capsized."

Capt. Hughes, the owner of several barges, says that in loading a barge the larger portion of the cargo must be placed on the bottom; "that every man handling a barge ought to know, and is supposed to know, the depth and width of her, and how to load her,—if he don't, he will get himself into trouble."

The opinions of Jones and Denny, both practical men, are to the effect that, with her cargo properly distributed,—from one-half to two-thirds in the hold and the balance on deck,—the barge could safely carry 700 tons.

Mr. Moore, at whose ship-yard in Wilmington the barge was fitted out in January, says: "If the charter-party don't require her to carry stone on her deck, she was perfectly seaworthy."

It is unnecessary to make further extracts from the depositions. The judgments or opinions of two or three of the workmen who repaired the barge after each accident are not sufficient to outweigh the testimony of the master and marine surveyor, or to contradict the admissions of Mr. Locke. The barge was all that she was warranted to be by the charter-party, and the cause of her upsetting in the river was due solely to the bad and negligent stowing of the cargo. Had one-half of her load on that occasion been evenly distributed over the bottom and along the sides of the boat, she would not have careened. The charterers were in too much haste to load and unload; too eager to save time in taking on and discharging cargo; and, for their own convenience and advantage, and to save expense, chose to run the risk of carrying heavy stones "stacked up" in the hatches, and on deck, without regard to proper stowage, or to wind and currents. The master saw the danger, but did the best he could under the circumstances. For the natural consequences of such carelessness and want of ordinary skill on the part of the charterers or their servants the owner cannot be held responsible.

The origin of the leak which caused the sinking of the barge at the

government pier is not explained in such a way as to relieve the charterers from fault. The concurrent testimony of all the witnesses proved that the boat was well built, out of the best materials. Mr. Locke says:

"It was one of those unforeseen accidents that there is hardly any accounting for, unless it was in the improper construction of the barge. This barge was planked across the keelsons, the planks running across her keelsons to the outside of her side planking. Had her outside keelsons been rabbeted to have caught the plank without the running to the outside of the plank, the accident could not have happened. * * * At the point where we discharged these stone the water was 60 feet deep. The stone, of necessity, had to be dumped from the side of the barge. There was very little, if any, careening done when the stone was thrown from the side of the vessel into the water, but the cause is in some cases in putting over a stone that was not square; but then, when it would strike in the water, the water directed it from the vessel, and if it struck in a different way, the same thing would happen *towards* the vessel. And I believe that a stone of that kind struck so in the water; that this stone took a course under the vessel, and struck the ends of the planking in the bottom, which started the plank. Had she been otherwise constructed it could not have happened."

Capt. Kershaw, the superintendent of the ship-yard where the barge was repaired, says:

"She had the planks started on her bottom. It is customary, for that kind of work, to rabbet the plank in the bilge-log; then if a stone should fall it could not hit the plank. It could not hit it at all in a round-bottom boat."

To question 18. "Unless this boat had been cranky and top-heavy, would a stone, in your judgment, have struck the bottom planking at all? *Answer.* That is a little hard to answer. A stone striking the water might shoot one way or another,—slue in or out."

This is all the evidence on this point, and it is wholly unsatisfactory, inconclusive, and conjectural, so far as it relates to the faulty construction of the barge. The manner of dumping over the stones, the state of the weather and condition of the sea on the tenth of June, are not described, and we are not positively told whether the leak was caused by defective and improper construction or by an accident that could have been foreseen and avoided by ordinary precautions in discharging the cargo. One thing would appear to be certain, and that is, that it would require a vessel to be of a very strong and peculiar build to stand the scraping of stones weighing from one and a half to three tons each along her sides, when dumped from her deck into the water. No special efforts seem to have been made to protect the sides when the boat careened, or a thin stone slued in towards her bottom. The charterers knew that the barge was built with "wall sides," tapering towards a flat bottom which was but three feet and nine inches narrower than the top. It is obvious that a slight careening would bring the side in contact with a stone falling perpendicularly from the deck, and that such careening could be caused either by a wave of the sea or by the sudden discharge of a heavy weight from one side of the deck. In either case it was the

duty of the charterers to have exercised ordinary care and skill in throwing over these huge stones, and there is a total want of evidence to show that they did so. The unloading may have been, and probably was, conducted with the same reckless negligence and haste as were exhibited in stowing the cargo on the fifth of April. The charterers were under pressure to complete their contract with the government. They chose to run some risks, and they must abide the result. It is not contended that the sinking was caused by a peril of the sea, and there is no proof that the barge or its owners were in fault.

The claim of Magowan for the monthly payments after the end of June, at which time the charter-party was to expire by its own terms unless renewed by the charterers, cannot be allowed. The charterers did not, it is true, actually deliver the possession of the boat to its owner at the end of the first six months, or give notice to him that they would not renew the charter-party; but it was not necessary for them to do either, because the owner had knowledge of the fact that the insurance agents and ship-builders had taken and obtained possession of her from and after the tenth of June until she was seized by the marshal at the suit of Andrews & Locke, and that she had been in the custody of that officer ever since.

The only question remaining is whether the charterers should pay the hire for the whole month of June. In view of the history of the case, and with my conviction of the real causes of the sinking of the boat, I think they should be held liable. A decree will therefore be entered for the owner for the sum of \$1,200 with interest on the monthly payments for April, May, and June from the dates on which they were respectively due until the entry of the decree, with his costs in this suit.

The libel of Andrews & Locke is dismissed, with costs.

THE S. ANDERSON.¹

SAVELAND and others v. THE S. ANDERSON.

(*District Court, E. D. Wisconsin. April, 1886.*)

COLLISION—CROSSING COURSES—SPECIAL CIRCUMSTANCES JUSTIFY A DEPARTURE FROM THE ORDINARY RULE—FAULTY EXECUTION OF MANEUVER—HALF DAMAGES.

The schooner E., while sailing with the wind nearly aft, sighted the schooner A. The latter vessel was, at the time, close-hauled on the starboard tack. The vessels were sailing on crossing courses; the red light of the E. bearing five points on the A.'s starboard bow, and the green light of the A. bearing four points on the E.'s port bow. The distance between the vessels was from one-eighth to one-fourth of a mile. A thick fog prevailed, shutting in the lights

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

of both. In this emergency the E., instead of passing astern of the A., luffed. The A., instead of holding her course, put her helm up. In executing the maneuver the E. did not luff sufficiently to materially deaden her headway, and the A., instead of gaining distance by a slight change of helm, made an extended circuit. When each vessel attempted to regain the course upon which she had been sailing, prior to the execution of the maneuver, they met again in closer proximity, but in positions otherwise corresponding almost precisely with those in which they originally stood. *Held*, that the closeness of the vessels when first seen was a special circumstance which justified a departure from the ordinary rule of the road, but that as both vessels were in fault in the execution of the maneuver, and as the collision resulted therefrom, the damages should be divided.

In Admiralty.

M. C. Krause, for libelants.

Van Dyke & Van Dyke, for claimant.

DYER, J. This is a libel *in rem* to recover damages for injuries to the schooner Ebenezer, caused by a collision with the schooner Anderson. The collision occurred about 10:30 p. m., June 14, 1879, on Lake Michigan, about 15 miles off Port Washington. The night was dark, and there was a heavy fog which prevented a view of objects except at a short distance. The wind was a moderate breeze from the south. The Ebenezer, bound from Milwaukee to Washington Harbor, was heading N. by E. $\frac{1}{2}$ E., and, with all sails set, was sailing light directly before the wind, at a speed of about five miles an hour. The Anderson, bound from Elk Rapids to Chicago, was sailing close-hauled on the starboard tack, laden with a cargo of pig-iron, and heading S. E. by E. Her speed was about four miles an hour. The lights of both vessels were in their proper places, and burning. The red light on the Ebenezer was first seen on the Anderson when about a quarter of a mile distant, and bearing about S. by E. $\frac{1}{2}$ E., or about five points on her weather bow. The Anderson's green light was first seen on the Ebenezer when the vessels were about one-eighth of a mile apart, bearing about four points on her lee bow. On the Anderson it was the master's watch, composed of three persons,—the master as officer of the deck, one seaman as lookout stationed on the fore-castle, and another at the wheel. On the Ebenezer it was also the master's watch, composed of two persons,—the master at the wheel and one seaman forward. The Anderson carried a master, mate, and four seamen. The Ebenezer carried a master, mate, two seamen, and a passenger. The lookout on each vessel sounded the fog-horn according to the regulations, but on neither vessel was the horn of the other heard.

The courses of the two vessels crossed, and when the crew of each knew of the proximity of the other they were very close. As the Ebenezer had the wind free, and as the Anderson was close-hauled on the starboard tack, it was the duty of the Ebenezer to give way. The general rule applicable to the situation required the Ebenezer to change her helm so as to go off to the starboard side of the Ander-

son, passing her astern, and for the Anderson to keep her course. But as the vessels were so close when the lights of each were first seen, I am satisfied the Ebenezer could not have performed that maneuver with safety, and, in obeying the rules, "due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

The testimony shows that when the green light of the Anderson was sighted, the vessels, as near as could then be determined, being about one-eighth of a mile apart, and rapidly meeting, the master of the Ebenezer put her wheel hard down. The men below were called up, and the main sheet was hauled aft. This brought the vessel up in the wind, heading about east. At the same time the wheel of the Anderson was put up, her mizzen sheet was slacked off, and the vessel ran before the wind. This movement brought her on a north-easterly course. Thus, both vessels tried to keep out of the way of the other, and, as we shall presently see, the movement of each tended to baffle the other. The mate of the Ebenezer says when he arrived on deck from below he saw the stern of the Anderson as she was passing off on a north-east course before the wind. The lookout on the Anderson says that as that vessel changed her course from S. E. by E. to N. E., or N. E. by E., he saw the broadside of the Ebenezer, which placed that vessel on an easterly course, or, perhaps, a little south of east. Thus the vessels were situated when, after a few moments, the master of the Anderson, undoubtedly supposing he had sailed far enough out of his original course to again resume that course without danger of collision, ordered the wheel of that vessel put down and the mizzen sheet hauled aft. This brought her back on her starboard tack, and in a moment or two, as she gained headway, she found the Ebenezer again directly in her path, with a collision then unavoidable, and she struck the Ebenezer directly amidships, bow on.

With these facts before us, it is not difficult to see what were the causes of the collision. Indeed, it is plain that both vessels were in fault. Since the vessels were too close to enable the Ebenezer to jibe and go astern of the Anderson when they first sighted each other, the movement by which it was sought to put her up in the wind was a proper one. As there were only two men on deck, and as those below had to be called up, there was some delay when every moment was precious in hauling the main and fore sails aft, so as to successfully bring the vessel up to the wind; and I am satisfied she was never, during the affair, brought as high up into the wind as she would head. After being hauled round she stood on an easterly course. This conclusion accords with the weight of the testimony, and with the circumstances, and with the diagrams furnished by both parties. One or two of the witnesses think she may have been brought round so as to be heading E. S. E., but the circumstances strongly indicate that

she stood more to eastward. Even if her course was E. S. E., she was within six points of the wind, and she would head five points to the wind. This is the testimony of the mate. After she was brought about, and her speed thereby slackened, she would soon drop off, her canvas would fill, and she would move ahead, and this is precisely what the libellant Saveland, who was on board, says she did. As she took an easterly course, therefore, she was going ahead, so that when the Anderson, after her first maneuver to avoid the collision, resumed her original course, both vessels, although at some distance from their first point of proximity, met again in positions corresponding almost precisely with those in which they originally stood to each other, and thus the collision was brought about. It is evident that when the Anderson changed her course, and went off with the wind to the north-east, and the Ebenezer also changed her course, and went to the eastward, they were going upon almost parallel courses, so that when each attempted to regain her original course there was as much danger of a collision as in the outset.

This, I am convinced, is the true story of this collision, and it seems plain that it might have been averted if the Ebenezer had kept up nearer to the wind, so that her movement ahead would have been more effectually arrested, and if the Anderson, instead of making a circuit towards the north-east, had kept her course, varying from it perhaps a point or two to the northward, as the necessity of the case might require. It took time for her to change her course and go off with the wind, and then to come back on her course again, and this proved to be just enough time to bring the Ebenezer, as she went off to the eastward, directly in position where the two vessels must meet. Thus the movement of each tended to baffle the other, whereas, if the Ebenezer had gone as high up in the wind as she could be placed, her speed would have been more effectually slackened, and the Anderson, by keeping her course, being under full speed, would have passed by. This, it seems clear, could have been accomplished, even if the master of the Anderson had deemed it necessary to deflect from her course one or two points.

It seems to me a plain case of fault in both vessels, and therefore one in which the damages must be divided. Decree accordingly.

Power and another v. BAKER and another.¹

(Circuit Court, D. Minnesota. April, 1886.)

JUDGMENT AGAINST JOINT TRESPASSERS—PLAINTIFFS' RIGHT OF ELECTION—EFFECT OF PAYMENT OF MONEY INTO COURT—CLERK'S SATISFACTION OF RECORD.

In consequence of a collision between two vessels, owned respectively by the complainants and respondents, the latter filed a libel against the former in the admiralty. A decree for \$9,572.82 was obtained, and an appeal entered. Prior to the trial of the admiralty suit they also brought an action of trespass in the state courts against the owners of the ship-yard at which both vessels were lying at the time of the collision. In the latter suit they obtained a judgment for \$4,476.88, which amount was paid into court, and satisfaction entered of record by the clerk. The respondents declined to accept and receive the amount in question, and thereupon the complainants filed a bill in equity against them, praying that the decree in admiralty be discharged and canceled by reason of the payment into the state court of the judgment obtained against the other joint wrong-doer. *Held*, that when separate actions are brought for a joint trespass, the plaintiff can recover against one or all, and if separate judgments are obtained he may make his election. *Held*, that as this is a privilege of which he cannot be deprived, the clerk has no power to bind him without his assent, and payment in court neither concludes him, nor deprives him of the privilege of an election.

The facts in the present controversy, as disclosed by the pleadings, are as follows: In the fall of 1879 the steamer Butte, owned by the complainants herein, Power, McGarry, Rees, McKnight, and Andrew M. Johnson, now deceased, while on the ways at Bismarck, in a ship-yard owned and managed by C. S. Weaver and Roger S. Munger, under the firm name of C. S. Weaver & Co., the steamer mentioned having been hauled on the ways, and at the time mentioned being in the charge of the latter firm by a contract with the owners of the same, became loosened from her fastenings, and crushed the steamer Col. McLeod, which was also at the time mentioned in the care and keeping of Weaver & Co., by virtue of a contract entered into between Weaver & Co. and the owners of the McLeod, the respondents herein. In July, 1881, the owners of the McLeod filed their libel in admiralty against the owners of the Butte, in a case of maritime tort, charging the latter with the commission of wrongs, grievances, negligences, and omissions in the hauling, managing, and propping up of the said Butte, resulting, as alleged, in the damage to the said McLeod. Process *in personam* issuing against Thomas C. Power, one of the owners of the McLeod, and the said Power having been duly arrested in accordance with the mandate of the said process, P. H. Kelly and Joseph Leighton, of the petitioners herein, became the sureties of the said Power on the bail-bond duly given, according to the provisions of law, in the sum of \$5,000. The case was tried in the district court, and on appeal to the circuit court judgment was entered in favor of libelants for the sum of \$9,572.82, and an appeal was taken by the respondents to the supreme court of the United

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

States, which is now pending. Before the trial the same parties (libelants) brought a suit in the district court of the state for damages against C. S. Weaver and Roger S. Munger as joint trespassers with the respondents in the admiralty suit for the same tort, and judgment was rendered in favor of plaintiffs for the sum of \$4,476.88, which amount was paid into court by the defendants, and satisfaction of the judgment of record was made and entered by the clerk on the twentieth day of July, 1885; but the amount so paid into court never has been accepted by the plaintiffs, and they have, at all times since the rendition of the judgment, refused to proceed further in said action, and decline to accept and receive the amount so paid into court upon the judgment. The respondents in the case in admiralty now file a bill in equity against the libelants, praying that the decree in admiralty in the circuit court be discharged of record and canceled, by reason of the payment into the state court of the judgment obtained against the other joint wrong-doers. An answer is filed setting up the facts in regard to separate suits, and the proceedings therein, to which exceptions are taken, and have been fully presented by counsel.

C. D. O'Brien, for complainants.

Williams & Goodenow, for respondents.

NELSON, J. The defendants in this equity suit claim the right to make their election *de melioribus damnis* in the separate suits brought to recover damages for the tort. The doctrine is well established that when separate actions are brought for a joint trespass the plaintiff can recover against one or all, though others be acquitted; and if separate judgments are obtained, he may make his election to take the larger judgment or pursue the solvent party, and when made, he is concluded. This is a privilege of which he cannot be deprived. He can only have one satisfaction, but the judgment satisfied must be the one which he has elected to take. The doctrine is fully reviewed in *Lovejoy v. Murry*, 3 Wall. 2, and it is there stated: "No matter how many judgments may be obtained for the same trespass, or what the varying amounts, an acceptance of satisfaction of any one of them by the plaintiff is the satisfaction of all the others, except the costs." The answer in this suit denies any acceptance of satisfaction, and the complaint does not even allege that the plaintiff in the state court received the money deposited therein.

The rule stated in *Blann v. Cocheron*, 20 Ala. 320, cited by United States supreme court, is substantially this: The clerk has no power by his acts to bind the plaintiff unless he assents, and the payment into court of the amount of one judgment does not conclude him, and cut off the privilege of election; the plaintiff must act.

Exceptions overruled.

THE JOHN S. SMITH.¹

MAYO v. THE JOHN S. SMITH.

(District Court, E. D. New York. April 6, 1886.)

COLLISION—TRIPPING ANCHOR—DRIFT—NEGLIGENCE—NOTICE OF INTENTION TO DRIFT.

When the schooner W. tripped her anchor knowing that, as the wind and tide then were, she would drift rapidly, and across the course of vessels coming up the bay; and, having done so, drifted and collided with a tug, having the schooner A. in tow, which was within hailing distance when the anchor was tripped; and nothing showed that the tug had notice beforehand of the schooner's intention to drift, or could have avoided her after the drift had begun: held, that the schooner W. was liable for the collision.

In Admiralty.

Wilcox, Adams & Macklin, for libelant, Elisha Mayo.

Edward D. McCarthy, for the tug.

Butler, Stillman & Hubbard, for the schooner Frank Atwood, in tow of the tug.

BENEDICT, J. Situated as the schooner Phebe J. Woodruff was, and with the wind and tide as it was, it was a fault in the Woodruff to trip her anchor when she did. She knew that she would drift rapidly the moment her anchor broke ground, and that her drift would carry her across the course of vessels coming up the bay. It was her duty, before taking such a drift, to be sure that it would not endanger any vessel near. If she knew of the presence of the tug or tow when she tripped, it was a fault not to hold on by her anchor till the tow, then within hailing distance, had passed. If she was ignorant of the presence of the tug and tow, that ignorance was a fault.

Whether the tug was not in fault is the remaining question. I do not think that the tug was chargeable with the knowledge of the schooner's intention to trip her anchor when she did. The spanker gave no such notice. It had been up for some hours. The presence of the crew of the Woodruff at the windlass gave no such notice. They had been at work there for some time. The act of drifting first gave notice of the schooner's intention to drift, and the act was observed by the tug as soon as it commenced. Want of lookout on the tug, therefore, was no cause of the accident. Neither was it a fault on the part of the tug to keep going, notwithstanding the drift of the schooner. To stop would have been fatal. Her only way was to port or starboard. She did the former, and I am not satisfied that it was an error so to do. But if it was an error, it was no fault. A mistake on the part of the tug in adopting a method of escape from an imminent peril, caused by the change of the schooner

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

from a vessel at anchor to a vessel drifting rapidly athwart her course, should not, in my opinion, be imputed to her as a fault.

The libel must be dismissed, with costs.

THE CITY OF CHESTER.

(*District Court, S. D. New York. April 5, 1886.*)

COLLISION—DAMAGES—REPAIRS IN EXCESS—SURVEY.

When repairs of a general character, beyond the injuries inflicted by a collision, are made at the same time, and without separation of the items of the work as the repairs progress, the bills of repairs presented are no criterion of the damages, and the items of repairs claimed will be closely scrutinized to prevent exaggeration. The estimate of competent surveyors made immediately after the injury may be used in evidence. The commissioner in this case having, upon a careful investigation, allowed much less than the estimate of the surveyors, the report was confirmed; though the repairs, as made, adopted different methods from those recommended by the surveyors, by allowing the expense of strengthening pieces, and disallowing the surveyors' estimate of permanent depreciation.

In Admiralty.

E. D. McCarthy, for libellant.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. Notwithstanding the skillful and ingenious argument of counsel in behalf of the exceptions in the above case, I am satisfied, upon a careful consideration of the testimony, that no injustice is done to the claimants by the commissioner's report. The court, so far as in its power, will take equal care to prevent the exaggeration of claims, and to afford full reparation for the actual injury. Where repairing is delayed, and the repairs finally made are more extensive than the injury calls for, the closest scrutiny in separating the charges made is obligatory. The repairs are not in any case the necessary and sole criterion of the damages. The actual damage properly proved may be recovered though the boat never be repaired; or the repairs may be partial only, and recovery may be had for the partial repair, with an allowance for permanent depreciation. One of the chief objections in this case is to the expense attendant on putting in strengthening timbers. This mode of repair was adopted instead of that recommended upon the survey made shortly after the accident. But the survey, which was made by competent experts, while providing for certain repairs, gave a further estimated allowance of \$2,000 for permanent damage. This last sum alone is much in excess of all the damage allowed by the commissioner. He has allowed the expense of the strengthening pieces in the place of certain other recommendations in the survey, but disallows all claims of permanent de-

preciation, thus finding a sum far less than the amount of the survey. In the details of the expenses he has also cut off \$200 from the labor account, by reason of its apparent large excess above the usual average relation to the material used. The nature of the repairs done, however, would, in this case, involve a larger proportion of labor than usual. Upon a careful review of the whole subject, I do not think the claimants have any just cause of complaint, and the report is therefore confirmed.

THOMAS v. THORWEGAN.

(District Court, W. D. Tennessee. March 23, 1886.)

ADMIRALTY PRACTICE—JURATORY CAUTION OR PAUPER'S OATH.

Poor persons may sue in the admiralty, without giving security for the costs, on complying with the practice of the court for giving the juratory caution, which practice is explained.

In Admiralty.

Gantt & Patterson, for libelant.

HAMMOND, J. This is an application to sue for personal injuries upon taking the pauper's oath. So far as it is a libel *in rem* against the steam-boat, the pleading must be reformed, as there can be no joinder of actions *in personam* and *in rem* in cases like this. Admiralty Rule 16. Otherwise the proceeding seems to be correct, and conforms to the practice and forms prescribed by this court for allowing poor persons to sue in the admiralty without security for costs. *Southworth v. Adams*, 2 Flippin, 282, *in notis*; *Bradford v. Bradford*, 2 Flippin, 282. The clerk will file the libel and issue process on the libelant taking the required oath as was done in that case. So ordered.

HANCOCK v. HOLBROOK and others.¹

(Circuit Court, E. D. Louisiana. March 15, 1886.)

1. REMOVAL OF CAUSES—CITIZENSHIP—PARTIES.

In causes where the parties, plaintiff or defendant, consist of more than one, they must be collectively so situated as to authorize a removal. *Florence Sewing-mach. Co. v. Grover & Baker Sewing-mach. Co.*, 18 Wall. 553; *Knapp v. Railroad Co.*, 20 Wall. 117.

2. SAME—LOCAL PREJUDICE ACT OF 1867.

Citizenship of different states is not enough, under the local prejudice act of 1867. The locality—the citizenship—of the party adverse to that of him seeking the removal should be in the state where the local prejudice is averred to exist.

On Motion to Remand.

John D. Rouse and Wm. Grant, for plaintiff.

Thomas J. Semmes and Robert Mott, for defendants.

BILLINGS, J. In the year 1876, plaintiff, describing himself as a citizen of the state of Louisiana, commenced this action in the state court. The cause was, apparently by consent, brought to the circuit court; has been tried and appealed to the supreme court of the United States, which held that the jurisdiction of the circuit court did not appear in the record, and directed the circuit court to remand the cause. This was done. Subsequently to the cause having been remanded to the state court, to-wit, on the eighth day of December, 1885, the plaintiff filed a petition for removal of the cause to the circuit court, verified by his affidavit and accompanied by his proper bond. The affidavit is to the effect that the plaintiff was, at the time of making the same, a citizen of New York, and that the four respondents (the suit having been discontinued as to the fifth defendant) were citizens of the state of Louisiana. The state court refused the transfer; but an authenticated copy of the record has been filed in this court. The issue has been presented by two of the defendants, namely, Mrs. George Nicholson (formerly Mrs. Eliza Jane Holbrook) and George Nicholson, that they were at the time this last petition for removal was filed in the state court citizens of the state of Mississippi.

The application for removal was made under the act of 1867, called the "Local Prejudice Act." The affidavit of the plaintiff that he had become, and was at the time of filing his last petition for removal, a citizen of the state of New York is uncontradicted. Mr. and Mrs. Nicholson have offered the testimony and affidavits of numerous witnesses, and have abundantly established that they were, at the time of the filing of the plaintiff's last petition for removal, citizens of Mississippi.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

The first proposition contended for by the counsel for the plaintiff is that, under the act of 1867, the citizenship of the parties at the time of the application for removal, and not at the time of the commencement of the suit, is to be looked at. In *Insurance Co. v. Pechner*, 95 U. S. 185, the court reserve this question, and state that the language of the act of 1867, bearing upon this question, is different from that of 1875. But the court need not decide this question in this case. If it be assumed, without any decision upon this point, that the law is as it is claimed by the plaintiff's counsel, we then have a cause pending in the state of Louisiana against four defendants, wherein the plaintiff is a citizen of New York, two defendants are citizens of the state of Mississippi, and two defendants are citizens of the state of Louisiana. The nature of this cause has been passed upon by the supreme court, (*Hancock v. Holbrook*, 112 U. S. 231, S. C. 5 Sup. Ct. Rep. 115,) where the court say: "There is no pretense of a separable controversy." It is to be observed that the suit is between a citizen of New York, two citizens of Mississippi, and two citizens of Louisiana, brought in the latter state.

It is contended by the learned counsel for the plaintiff that the fact that the controversy is altogether between citizens of different states, and that the plaintiff is a citizen of another state, and two defendants are citizens of the state where the action is brought, authorized the removal, notwithstanding the fact that two of the defendants are non-resident citizens. Where a removal is sought under the act of 1867, and more than one person are joined as plaintiffs or defendants, and where, as here, the supreme court has determined the cause of action is not divisible, the test of citizenship must apply to each party to the suit collectively. *Florence Sewing-mach. Co. v. Grover & Baker Sewing-mach. Co.*, 110 Mass. 70. In this case, after it reached the supreme court of the United States, it was held, (18 Wall. 553:) "A case in which the plaintiff is a citizen of the state where the suit is brought, and two of the defendants are citizens of other states, a third defendant being a citizen of the same state as the plaintiff, is not removable under the act of 1867 upon the petition of the two foreign defendants." The court say, at page 583: "Where plaintiffs and defendants are both non-residents, the acts of congress make no provision for removal." In *Knapp v. Railroad Co.*, 20 Wall. 117, the court holds that the act of 1867 does not change the settled rule that determines who are to be regarded as the plaintiff and the defendant, *i. e.*, that the plaintiffs and defendants must be collectively such as to authorize the removal. The case of *Johnson v. Monell*, 1 Woolw. 391, might have led to a decision of this point, but did not. The reasoning in *Sands v. Smith*, 1 Dill. 290, is in favor of the doctrine contrary to that which the supreme court have established. The same may be said of *Akerly v. Vilos*, 2 Biss. 110. But as the supreme court, in 18 and 20 Wall., cited above, have settled the question that the party, plaintiff or defendant, when consisting of more than one, must be collectively

so situated as to authorize a removal, this court must follow that construction. The case of *Myers v. Swann*, 107 U. S. 546, S. C. 2 Sup. Ct. Rep. 685, has not overruled these cases.

The removal act of 1867 is a more extensive act as to time when it may be put in operation than many of the other removal acts, in that it may be invoked at any time before trial. It requires the court, in order to transfer the cause, to inquire into no fact beyond the belief or fear on the part of the plaintiff or defendant seeking the removal that on account of local prejudice he cannot obtain justice in his cause in the local tribunals. This might wisely be permitted if the local tribunals were of the locality of the adverse party. But it seems to me that the intention of congress was that the locality—the citizenship—of the party adverse to that of him seeking the removal should be in the state where the local prejudice is averred to exist. The fact that enough exists to give the circuit court jurisdiction under the general statutes—viz., citizenship of different states—is not enough under the local prejudice act. In this case Mr. and Mrs. Nicholson are citizens of Mississippi, and the cause is pending in Louisiana; they are the chief defendants.

Let the cause be remanded.

LACROIX v. LYONS.¹

(Circuit Court, E. D. Louisiana. March 6, 1886.)

1. REMOVAL OF CAUSES—REMAND—ALIENAGE OF PARTIES.

A motion to remand on the ground of the alienage of both parties will be refused in a case removed into the circuit court where the jurisdiction is apparent on the record, because, in such a case, the jurisdiction can only be attacked by sworn plea or exception.

2. SAME—CASE AT LAW AND IN EQUITY.

Where a case comes from a state court as one case, of which the circuit court has jurisdiction, that court does not lose jurisdiction because one part of the case has to be tried on the equity side, and the other part on the law side, of the court.

On Motion to Remand.

Ernest T. Florance, for defendant.

Ernest B. Knittschnitt, for plaintiff.

PARDEE, J. This suit was instituted in the civil district court of the parish of Orleans for an injunction to prevent infringement of a trade-mark. The petition alleged that the plaintiff was an alien citizen of France, and that the defendant was a citizen of one of the United States. An injunction *pendente lite* was issued. The defendant filed

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

an answer denying plaintiff's right to the alleged trade-mark, claimed it for himself, and further set up "that under the law of France of June 23, 1857, entitled '*Sur les marques de fabrique et de commerce*,' plaintiff had no title to said trade-mark in France, and under the treaties of the United States and France no title thereto in the United States." The defendant, besides answering, filed a demand in reconvention for damages for the illegal and wrongful issuance of the injunction, and for damages resulting from the publication thereof, and for attorney's fees; and at the conclusion of the reconventional demand the averment is made that plaintiff resides in the republic of France and defendant in the parish of Orleans. Thereupon the plaintiff filed a petition and bond for removal of the case to this court. In the petition for removal is an allegation that the plaintiff was, at the commencement of the suit, and still is, an alien, a resident and citizen of the French republic, and that the defendant then was and still is a citizen of one of the United States. The state court accepted the bond, and directed the removal of the case.

In this court the transcript has been filed, and the plaintiff has recast his pleading so as to conform to the equity rules of this court; and in the recast bill the averment is again made of alienage of plaintiff, and the citizenship of defendant, and a case is made that in part arises under the laws of the United States. After the transcript was filed in this court the defendant made a motion to remand the cause to the state court on the ground that both plaintiff and defendant were aliens, the one being a citizen of France and the other of Great Britain. This motion was postponed to allow the complainant to recast his pleadings to enable the court to determine whether the case should go on the equity docket or law docket, or both. Since the pleadings were recast the motion to remand is again made on the same ground of alienage of both parties.

This motion is now for decision, and is refused because (1) when a case is once brought in this court with jurisdiction apparent on the record, the jurisdiction should only be attacked by sworn plea or exception. Equity Rules, 31; Circuit Court Rules, No. 7. See *Hoyt v. Wright*, 4 Fed. Rep. 168, and the case of *Hartog v. Memory*, 116 U. S. 588, S. C. 6 Sup. Ct. Rep. 521. (2) Because if the alienage of both parties is established, still the jurisdiction of the court is apparent on the record, as the case is one arising under the treaties of the United States. See *Railroad Co. v. Mississippi*, 102 U. S. 135. (3) Because as the requisite citizenship to warrant a removal to this court was apparent, on the record, the allegation in the petition for removal of the alienage of the plaintiff and the citizenship of the defendant was a useless averment, and did not operate to hinder the removal from being claimed and operative on the ground that the case was one arising under the public treaties of the United States. See section 3, Act 1875. (4) Because if the case were remanded on the ground claimed, it could be at once removed again to this court, and

the court ought not to put the plaintiff to the useless cost and expense when the record shows fully present jurisdiction of the case.

The main contention of the defendant is that, if the case remains in this court, his reconventional demand for damages must go on the law side of this court as an independent case, and will be without our jurisdiction because of the fact that both plaintiff and defendant are aliens. It is conceded that the plaintiff's suit for an injunction and the defendant's demand in reconvention constituted but one case in the state court, and it must follow that it comes here as one case. If it comes here as one case, of which case this court has jurisdiction, then I think it follows that we do not lose jurisdiction because under our practice we try one part of the case with a jury and the other part without. But however this may be, if the case is properly brought here for trial, and we find that we cannot follow the involved practice allowed in the state court, and allow a suit for damages for the illegal issuance of an injunction to be tried in the same case as the injunction suit, nor as a part of the same case, and we find that we have no jurisdiction thereof, we shall have to dismiss the reconventional demand for damages without prejudice. This result will not defeat the plaintiff's right to remove a removable case; perhaps he may have removed the case for the purpose of taking advantage of our different practice. See *Ex parte Fisk*, 113 U. S. 726; S. C. 5 Sup. Ct. Rep. 724.

Dodd and others v. GHISELIN.¹

(Circuit Court, E. D. Missouri. April 12, 1886.)

1. JURISDICTION—SUIT BY GUARDIAN.

Where a minor sues by his guardian, the citizenship of the former determines the jurisdiction of the court.

2. EXECUTORS AND ADMINISTRATORS—CONNIVANCE AT IMPROPER CLASSIFICATION OF CLAIMS.

Where an administrator, by collusion and connivance, aids in having claims placed in a higher class than that in which they belong, and in that way prevents any thing being left for other claims of the same sort, properly classed, he is liable to holders of the latter claims for their share of the amount diverted, and may be sued in this court therefor.

3. SAME.

It is unnecessary for the claimants wronged, to await the final settlement of the estate before suing, even where by so doing they could obtain a remedy in the probate court by a restatement of the account.

4. SAME—STATE LAWS BINDING.

State laws providing for the settlement of estates of deceased persons are binding upon federal courts.

In Equity. Demurrer to bill.
L. B. Valliant, for complainants.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

Given Campbell, for defendant.

BREWER, J., (*orally.*) In the case of Dodd and others against Ghiselin, administrator with the will annexed, there is a demurrer to the bill—*First*, on the ground that this court has no jurisdiction, by reason of the citizenship of the parties; *second*, that there is a defect of parties; *third*, that there is no equity in the bill.

The bill is brought by two minors, citizens of the state of Texas, by their next friend and curator, the latter being a citizen of the state of Missouri, against the defendant, a citizen of Missouri, and the claim is that the parties litigant are the curator on the one side and the administrator on the other, both citizens of Missouri. The case of *Coal Co. v. Blatchford*, 11 Wall. 172, is cited, which holds that trustees and executors, suing for others' benefits, are the parties holding the legal title and the ones whose citizenship determines the jurisdiction of the federal court. But the title to the property of a minor is in the minor. The curator or guardian represents him, but does not have the title; and in the leading case of *Lamar v. Micou*, 112 U. S. 452, S. C. 5 Sup. Ct. Rep. 221, the supreme court notices the distinction:

"The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case the title is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment."

The bill alleges that the judgments rendered in the state court, upon which this suit is founded, were rendered in favor of the minors. Before this bill was filed the curator was, by this court, appointed as next friend, with power to bring this suit. That ground of the demurrer is not well taken.

I pass to the third question; that is, whether there is any equity in the bill. The facts as stated are these: One Jamison was curator of the estate of these minors. As such he defaulted. A new curator, Mr. Scudder, was appointed in his place. Judgments were rendered in the probate court on July 21, 1885, in favor of these minors, and against Jamison, their former curator. William F. Ferguson was the bondsman of this curator. He died in 1883, and Mr. Ghiselin was appointed as administrator with the will annexed. This was done September 19, 1883. Statutory notice was published, and the estate is now in process of settlement in the probate court. The bill charges that the estate of Ferguson will not pay all the claims allowed against it,—will not pay even all the claims allowed and classed in the fifth class. It charges that there are about \$65,000 of claims which have been allowed and classed in the fifth class. The claims of these minors were not exhibited until one year had elapsed, and could not be, because they had not passed into judgment against their former curator; and so, not having been presented until after the expiration of the first year, were allowed and classed in the sixth class. As the estate will not pay all the fifth-class claims they will get nothing.

It further charges that two of the claims, amounting to about \$40,000, which were allowed and classed in the fifth class, were not in fact exhibited to the administrator within one year; but by his collusion, and by connivance between him and with the claimants thereof, were reported to the court as exhibited during the first year, and allowed and classed in the fifth class.

Upon these facts counsel asserts—*First*, that, notwithstanding the law of Missouri provides that claims presented within one year shall be allowed and classed in the fifth class, and those presented afterwards shall be allowed and classed in the sixth class, and that the fifth-class claims shall be paid in full before any payment on the sixth-class claims, this court, sitting as a court of equity, is not bound by that law; that equality is equity; that the two claims of forty thousand and odd dollars, which were allowed and classed in the fifth class, being of the same nature, are of only equal equity with the claims in favor of the plaintiffs. In fact, those were claims against the testator as bondsman of the same William F. Ferguson, though as curator of another estate.

I should have stated one further fact as charged in the bill, and that is that although an order has been made to pay 20 per cent. upon the fifth-class claims, the administrator has in his hands enough assets undistributed to pay these claimants (the plaintiffs) *pro rata* with the other holders of fifth-class claims. So, it is insisted that as the administrator has not made distribution of all the assets, as equality is equity, that this court should adjudge against him that he distribute *pro rata* between these parties who have sixth-class claims and those having fifth-class claims of the same nature. Let us see to what that would lead: The administrator is an officer of the probate court, and bound to obey its orders. This court has no power to control the actions of that court, or direct what its judgments shall be. The law of Missouri requires that fifth-class claims be paid before sixth-class claims. The due and orderly administration of affairs in the probate court will necessarily lead to an order upon the administrator that he pay these fifth-class claims. If he does not pay them in full before he pays any on the sixth-class claims, judgment will be rendered against him, to which he and his bondsmen will be liable. Can it be that, discharging his duty in strict obedience to the orders of the court which appointed him, and to the law of the state of which he is an officer, he can be held liable to a judgment in this court. The only way out from such a result would be to hold that this court has power to interfere and take from the probate court the possession of those assets, and itself administer the estate, and that, the supreme court has held, cannot be done. *Yonley v. Lavender*, 21 Wall. 276.

Take another illustration: In some of the states attachments have priority as liens according to the dates of the levies. Suppose there are two creditors, one having a matured claim, and the other one not

yet due; the former sues out his attachment, and makes his levy; the other cannot, in time for a contemporaneous levy. Can it be that a court of equity of the United States will interfere or take from the sheriff the attached property, and distribute it equally between the two creditors upon the doctrine that "equality is equity?" The whole theory of this claim is that the administrator is liable to a decree in this court because he is obeying the laws of the state of Missouri, and that these non-resident minors have a right to insist upon a disregard of those laws by this court. There is no such right. This court does not sit here to overturn the laws of the state of Missouri, but to enforce them. So far as those laws are valid and constitutional, and there is no question of validity in this case, they are just as binding upon this court as upon the state courts. Obedience to the laws of the state of Missouri is no basis for liability to an action in this court. I find in the authorities nothing which justifies this claim.

The various cases cited are these: The first is that of *Union Bank of Tennessee v. Jolly's Adm'rs*, reported in 18 How. 503. By the laws of the state of Mississippi, when an administrator takes possession of an estate, if he thinks it is insolvent, he may apply to a court, obtain an order, and have notice of insolvency published, and then those creditors that come in and present their claims in this insolvent proceedings share in the assets. If they do not come in, they do not share. An administrator taking possession of an estate believed it insolvent, and took the regular proceedings, but when he closed out the estate he had a surplus of six or seven thousand dollars. This claimant had not presented his claim in those proceedings. Now, under the law of Mississippi, the surplus went to the heirs; but the supreme court sustained a bill in favor of this claimant as against the administrator to the extent of the fund in his hands. Well, it is familiar law that a court of equity will follow the assets of an ancestor in the possession of the heir, and apply them to the payment of the debts of the ancestor. There may be exceptions, but that is the general rule. Now, instead of waiting for the administrator to turn the property over to the heirs, and leaving the claimant to then proceed against them, the court simply intercepted the fund in the possession of the administrator, and awarded it to the claimant creditor. That is all there is in that case.

In *Payne v. Hook*, 7 Wall. 425, which went from this court, the complainant, a distributee, alleged that the administrator was guilty of maladministration, false settlements, an appropriation of funds to his own use, and that by misrepresentation he had wrongfully obtained a receipt or release from her. By this suit against the administrator she sought to set aside these false settlements, and this wrongful receipt; and she obtained a decree for that which was rightfully her share of the estate. It was objected that no such proceeding could be had in any state courts until after final settlement in the probate

court, and therefore it was urged that until then no such proceeding could be maintained in this court. But the supreme court held otherwise; that the laws of a state which regulate practice did not prevent the exercise by United States equitable courts of their inherent jurisdiction; and that although a proceeding could not have been instituted in the state court until after final settlement, there was no such restriction upon the powers of the federal court, but that they could proceed whenever a case arose justifying equitable interference. They did not, however, hold that any right could be enforced in the federal courts which could not be enforced in the state courts. If there had been maladministration, and the administrator had misappropriated the assets of the estate, in all courts of equity such a wrong could be righted. That they did not mean anything more than that, is evident, not merely from the facts of the case, and the opinion filed therein, but also from the comments of the same court in the subsequent case of *Yonley v. Lavender*, 21 Wall. 276. Referring to this case of *Payne v. Hook* the court says:

"It was contended as the complainant, were she a citizen of Missouri, could only obtain relief through the local court of probate, that she had no better right because of her citizenship in Virginia; but this court held that the equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses; is subject neither to limitation nor restraint by state legislation; and that a bill stating a case for equitable relief according to the received principles of equity would be sustained, although the state court having general chancery jurisdiction would not entertain it. The bill charged gross misconduct on the part of the administrator, and one of its main objects was to obtain relief against these fraudulent proceedings. This relief was granted, and the administrator was compelled to faithfully carry out the trust reposed in him, and to pay to the complainant the distributive share of the estate of her brother, according to the laws of Missouri."

But this case of *Yonley v. Lavender* throws further light upon this question, and decides that an estate in the hands of an administrator is in the custody of the court appointing him, and cannot be taken out of such custody by the federal courts. It appeared that a creditor of a decedent in Arkansas, whose estate had been placed in the hands of an administrator by the probate court, commenced an action in the federal court, obtained judgment against the administrator, and issued execution, levied on the property, and sold it, and the purchaser brought ejectment. The supreme court of Arkansas held that the purchaser took no title, and the supreme court of the United States affirmed that judgment, and this quotation, notwithstanding its length, as it is pertinent to the present inquiry, I beg leave to read:

"The question is whether the United States courts can execute judgment against the estate of deceased persons, in the course of administration, in the states, contrary to the declared law of the state on the subject. If they can, the rights of those interested in the estate, who are citizens of the state where the administration is conducted, are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to

be a citizen of another state. This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the federal courts in the enforcement of individual rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the state, and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter, in contemplation of law, in the custody of the probate court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, but simply fixed the *status* of the party, and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property intrusted to him by a court of competent jurisdiction could be taken from him, and appropriated to the payment of a single creditor to the injury of all others. How can he account for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands? The lands in controversy were assets in the administrator's hands to pay all the debts of the estate, and the law prescribed the manner of their sale, and distribution of the proceeds. He held them for no other purpose, and it would be strange, indeed, if state power was not competent to regulate the mode in which the assets of a deceased person should be sold and distributed."

I think that case is conclusive upon this question. The law of Missouri, which provides that claims allowed and classified in the fifth class shall be paid before claims allowed and classified in the sixth class, is the law providing for a settlement of a deceased person's estate, and is binding upon the federal as upon the state courts.

Another ground upon which this bill is sought to be maintained is exactly the opposite. This which I have been considering is that the defendant was liable if he obeyed the law of the state; the other is that he is liable because he has disobeyed such law. In respect to that, it is said that the claims of these two creditors were not presented within a year, were not exhibited in the language of the statute; but that by collusion and connivance of the defendant with those claimants they were reported to the probate court as thus exhibited, and hence allowed as in the fifth class, and in view of the other circumstances that operate to the prejudice of these minors, whose claims are allowed in the sixth class. The theory is that the defendant is liable because he has disobeyed the laws of the state of Missouri; and if that be true, it seems to me that he is liable to these plaintiffs, whatever rights those other claimants may have to the payment of their entire claims. By his wrongful act he has prevented these plaintiffs from sharing in any part of the estate; for if these other claims had been classed in the sixth class, as they ought to have been, there would have been a *pro rata* division between them and these claimants. His wrongful act prevents that. For such wrongful act, I take it, he is liable in any court having jurisdiction. That I understand to be the proposition underlying the case of *Payne v. Hook*,—that an administrator guilty of wrong in his

administration, thereby renders himself responsible for that wrong to any person aggrieved thereby. If this administrator, by collusion and connivance, has lifted up claims which otherwise belonged in the sixth into the fifth class, and so has practically cut out these plaintiffs from any payment from the estate, to that extent he is personally responsible, and, I take it, it matters not in what court relief is sought. It may be in the state or in the federal courts; and, as in the case of *Payne v. Hook*, the parties are not obliged to wait until the final settlement of the estate, although they could obtain remedy in the probate court by a restatement of the account on final settlement. So, on that ground, and on that ground alone, the demurrer to the bill will be overruled, and the defendant can answer by May rules.

GAINES v. CITY OF NEW ORLEANS.¹

(Circuit Court, E. D. Louisiana. March, 1886.)

1. EQUITY—PRACTICE—HOW REGULATED.

The equity practice in the courts of the United States is regulated by the laws of congress, and the rules of the supreme court of the United States made under the authority of an act of congress.

2. SAME—DEPOSIT OF FUND IN REGISTRY.

The equity practice in the United States courts requires the court, that all parties who can by possibility have an interest in the fund, except a fraction of the defendant, unite in the application, to order the deposit of a fund garnished in the registry of the court, notwithstanding that the stakeholder, who is the agent of defendant, also resists.

On Motion for an Order Requiring Funds to be Deposited in the Registry of the Court.

Henry C. Miller, for Louisiana National Bank, garnishee.

Thomas J. Semmes and *Alfred Goldthwaite*, for plaintiff.

F. T. Nichols and *Chas. Carroll*, for Gas-light Company.

Walter H. Rogers, City Atty., for defendant.

BILLINGS, J. The question submitted is whether the sum of \$40,000, on deposit with the Louisiana National Bank, shall be deposited in the registry of the court. The bank has been garnished; has no interest in the money; holds the same as the fiscal agent of the defendant. The money is claimed by the plaintiff under her writ of execution, by the gas-light company under an ordinance of the city of New Orleans, and by the board of liquidation. The plaintiff and the gas-light company unite in the motion for an order requiring the deposit.

The execution under which the money was seized issued in an equity cause. Under the practice in the courts of the state of Louis-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

iana such an order would not be made; under the practice of the courts of chancery such an order would be made. 3 Daniell, Ch. Pr. 1819 *et seq.*; Jeremy, Eq. Jur. 254. It is not necessary to show that the fund is in danger, but merely that the plaintiff is solely entitled, or has such an interest jointly with others as to justify him on behalf of himself and them to have the fund secured. In all equity causes the chancery rules are followed to the exclusion of state practice. In *Bein v. Heath*, 12 How. 178, TANEY, C. J., says: "The proceeding in a circuit court of the United States is regulated by the laws of congress, and the rules of this court made under the authority of an act of congress." This case holds that even by a rule of the circuit court the equity practice cannot be departed from. The conclusion, therefore, is that the equity practice is to govern, and that that practice requires the court, that all parties who can by possibility have an interest in the fund, except a fraction of the defendant, unite in the application, the court ought not to refuse to order the deposit because the stakeholder, who is the agent of the defendant, also resists.

The order will therefore be entered.

COFFIN and others v. CITY OF PORTLAND and another.

(Circuit Court, D. Oregon. May 12, 1886.)

1. LEVEE—DEDICATION TO PUBLIC USE.

A dedication of real property to public use as a levee or landing on the bank of a navigable water implies and vests in the public a right to use the same without a grantee being named or in existence; and it rests with the legislature, as the representative of the public, to regulate such use, and to promote the same by improving the premises directly, or through the agency of the municipal corporation within whose limits the same are situated or otherwise.

2. SAME—ACCEPTANCE AND CONTINUANCE OF.

No formal acceptance of such dedication is necessary; nor does the existence of such easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all.

3. SAME—DEDICATION FOR A "PUBLIC LEVEE."

In 1850 the occupants of the Portland land claim dedicated a strip of ground on the river, within the limits of the town they had laid out thereon, as a public levee, and so designated it on the plat of the survey. *Held*, that the intent and understanding was to dedicate the property to public use as a landing place for the use of water-craft, and the transfer of freight and passengers to and from the river.

4. SAME—POWER OF THE STATE OVER DEDICATION TO PUBLIC USES.

The state may regulate the use of and improve the public landing, and authorize the collection of tolls for the maintenance of wharves and warehouses thereon, but it has no interest in the property, and cannot devote or subject it to any use clearly inconsistent with the purpose of the dedication, and if it undertakes to do so, the property is not affected by the act, nor will it thereby revert to the donor or his heirs.

5. SAME—ACT OF 1885, CONCERNING THE LEVEE.

The act of 1885, (Sess. Laws, 100,) construed to give the Portland & Wallamet Valley Railway Company the right to use and improve the public levee as a public landing, by the construction of wharves, warehouses, and terminal railway facilities thereon for the public use.

Suit in Equity to Declare and Enforce a Resulting Trust.

J. G. Chapman, for plaintiffs.

A. H. Tanner, for City of Portland.

Charles J. Macdougall, for Portland & W. V. Ry. Co.

DEADY, J. This suit is brought by the plaintiffs to have declared and enforced a resulting trust in a parcel of land in Portland known as the "Public Levee." The case was heard on a demurrer to the bill on the grounds of a want of equity therein and of jurisdiction in the court.

From the bill it appears that the plaintiffs are citizens of Oregon, and the defendants are corporations existing under the laws of Oregon,—the one a municipal and the other a private corporation; that prior to September 27, 1850, Stephen Coffin, D. H. Lownsdale, and W. W. Chapman were in the occupation, as partners, of a tract of land containing about 640 acres, situate on the west bank of the Wallamet river, including said public levee, and then known as the "Portland Land Claim;" that prior to said date said occupants caused said claim to be laid off in lots and blocks, streets, public squares, and places, including a public levee on the bank of the river between the east line of Water street and low-water mark, and extending southerly from the south line of Jefferson street about 520 feet, and about 150 feet in width at the north end, and 350 feet at the south end, and a map thereof to be made, commonly known as the "Brady Map," and then and thereby dedicated said levee to the public, and for more than 20 years thereafter jointly and severally sold and conveyed lots in the town of Portland by said map; that on March 10, 1852, said occupants, in order to comply with the donation act of September 27, 1850, and become settlers thereunder, divided said claim between themselves, whereby said levee was included in the donation of Stephen Coffin, who, during the year 1854, received a patent certificate for the same, upon which a patent was afterwards issued to him by the United States; that at the time of said division said occupants covenanted with each other as follows: "That he will fulfill and perform all contracts and agreements which he has heretofore entered into with the others, or with each of them, or with other persons, respecting the said tract of land, or any part thereof;" that said Coffin continued to recognize said dedication, and between the issuing of said patent certificate and January 23, 1865, sold and conveyed lots within his donation by said Brady map; that the inhabitants of Portland were incorporated by the act of January 23, 1851, and have ever since existed as a municipal corporation by that name, and the common council thereof, on April 29, 1852, adopted said

Brady map, and the same was and continued to be in general use with the knowledge of said Coffin from and after the spring of 1850; that on January 23, 1865, said Coffin executed a deed to Portland, "without consideration," of said "levee tract, in trust, for the use of a public levee or landing," reserving therein to himself all rights for a public ferry thereon, but Portland had no power to take said conveyance, or execute the trust therein contained, and the same is null and void, and in the year 1871, in consideration of \$2,500, Coffin executed another deed to Portland, relinquishing the alleged ferry right.

The bill then avers that the deed of 1871 gave Portland no additional right in the premises, the same having been previously dedicated by the grantor both by parol and the deed of 1865, and was only intended to extinguish said ferry right, and to enable the corporation to hold the premises "in trust for the use of a public landing or levee," discharged of such right; that in 1871 said premises were of the value of \$50,000, and that in obtaining the conveyance of that year Portland "falsely and fraudulently represented" that it intended "to hold and devote said premises for the use of a public levee or landing," by reason of which representations said Coffin was induced to make the same, and Portland had no right to take said conveyance except to extinguish said ferry right, and the same is void for any other purpose; that neither Portland, the state, nor the public has ever made any use of the premises as a public levee or landing; that said dedication was made in the belief that the same would be advantageous to the public and Portland, but it is contrary to public policy for either Portland or the state to maintain a free public levee or landing at any place in the former, nor could any charge be made for the same consistent with the dedication; that since said dedication was made the unimproved shores and banks of rivers have ceased to be used as a place for the deposit and shipment of goods, and the custom is to use wharves and warehouses, in the construction of which within the limits of Portland there has already been expended \$2,000,000, and there is yet river front owned by private persons that may be devoted to such purpose; that the premises cannot be used as a landing or levee unless improved, and it would be contrary to law and public policy for Portland to attempt to collect taxes from the owners of private wharves or other property for the purpose of constructing free wharves thereon, and to become liable for freight deposited there; that the primary purpose of the dedication was for "a public levee," which "is doubtful and uncertain, and unknown to the law, science, or history," and therefore void; that by the act of February 25, 1885, entitled "An act to provide for the construction to the city of Portland of the uncompleted portion of the narrow-gauge system of railways now in operation in western Oregon, and to provide terminal facilities therefor upon the public grounds in said city," the trust created by said dedication is "renounced and abro-

gated by the sovereign legislative power of the state," and it is now unlawful for Portland to hold said premises as a public levee, and there arises thereby a resulting trust of said premises in favor of complainants; that said railway company claims the right, under said act of 1885, to appropriate the premises to its use as a depot on making compensation to Portland for any right it may have therein, and "is striving and threatening to obtain possession" of the same for that purpose; that the premises are of the present value of \$70,000, and Portland has expended \$4,000 thereon; that the plaintiffs are the heirs at law of Stephen Coffin, except Albert Marvin, the husband of Lucinda Marvin, and before commencing this suit they gave notice to Portland that they were willing to repay it all sums of money expended on said levee. Wherefore they pray that a resulting trust of said premises be declared in their favor, and enforced against the defendant Portland by requiring it to convey the same to the plaintiffs, and that the railway company be declared to have no right to enter upon or use the premises.

The dedication of this property, as a public levee or landing, by Stephen Coffin in 1850, and the continued recognition thereof during his life, is stated and admitted in the bill. The naked dry legal title was all that remained in him thereafter, and that passed to Portland by his deed of 1865, subject to this easement. The reservation therein of a private ferry right or landing on the premises was probably void, as being inconsistent with the prior unqualified dedication of the premises to the use of a public levee or landing. This being so, nothing passed by the deed of 1871, which, according to the bill, was only intended to extinguish this alleged ferry right. In short, the transaction had no other effect than to give an old pioneer a few hundred dollars, to smooth the path of his declining years, and this was all that was probably intended by those who managed it.

But it is said that the original dedication is void for want of certainty, because the term "levee" is unknown, in the sense of a landing place, "to history, science, or law." The word comes to us from the French, and in its primary sense signifies a *rising*. But its signification has been much enlarged. Among other things it is used to denote an embankment on the margin of a river to prevent inundation,—particularly on the lower Mississippi. And when this embankment is used as a landing place or quay, as at New Orleans, the levee and the landing become convertible terms. From this metropolis of the south and south-west, this use of the word passed up the river and its tributary, the Ohio, to St. Louis, Louisville, Cincinnati, Wheeling, and Pittsburgh, where the open bank or slope of the river was used as a landing-place for the use of water-craft and the transfer of freight and passengers to and from them. And doubtless this is the sense in which it was used by the proprietors, Coffin, Lownsdale, and Chapman, when this dedication was originally made, who, as it is well known, all came from the region of the Ohio river, where

the slope or *rise* from the river in front of the town is or was commonly left open to the public, and used as quay, landing, or levee, sometimes with the aid of wharf-boats fastened to the shore. And this is confirmed by the fact that as late as 1865 Coffin uses the terms "public levee" and "landing," in the deed of that date, as synonymous. And such was also the common and public understanding of the term in this country, as appears from its use by the legislature in section 10 of the act of 1851, incorporating Portland, which gives power to the council "to lay out, regulate, and improve the streets, lanes, alleys, sidewalks, and *public levees* within said corporation," and "to provide for the removal of all * * * obstructions in the streets, lanes, or alleys, or *on the public levees* thereof." Here the "levees" are classed with the other highways or public easements within the corporation, and placed under its control. And the very discriminating use by the legislature of the prepositions "in" and "on" indicates a practical knowledge of the subject; an obstruction being, so to speak, *in* a street, which is or may be inclosed on both sides, and *on* a levee, bank, or landing that is open on the river side at least.

In *Parrish v. Stephens*, 1 Or. 59, 73, (1852,) which was a suit involving the fact of a similar dedication of the river front of the Portland claim north of Jefferson street, the bank is characterized in the opinion of OLNEY, J., as a "highway and public levee," and in the "supplementary opinion" of WILLIAMS, C. J., as the "public levee." On the well-known map of Portland, compiled by Alex. J. Graham, from "Brady's Travallots and City Maps," and published by S. J. McCormick in 1859, the premises in question are represented as open ground, without a street running through them, and designated the "Public Levee."

In the litigation arising in towns on the Mississippi and Ohio rivers, questions relating to the dedication and use of the river bank or front as a landing for the convenience of river commerce have been considered and decided on the theory that a dedication of such ground to public use implies and vests in the public a right to use the same as a highway, quay, landing, or levee, without any grantee being named or in existence; and that the legislature, as the representative of the general public, may regulate such use, and promote the same by the improvement of the premises, directly or through the agency of the corporation within whose limits the same are situated. *Cincinnati v. White*, 6 Pet. 435; *Barclay v. Howell*, Id. 498; *New Orleans v. U. S.*, 10 Pet. 662; *Rowan v. Portland*, 8 B. Mon. 232; *Godfrey v. Alton*, 12 Ill. 29; *Gardiner v. Tisdale*, 2 Wis. 153. And when, as in this case, the dedication is unconditionally made to a public use, as a levee or landing-place, no formal acceptance of the same is necessary; nor does the existence or continuance of the easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all; and it is even doubtful if the same

can be lost by the adverse occupation of the premises by private parties for any length of time. 2 Dill. Mun. Corp. (3d Ed.) § 675.

Taking the case made in the bill, by the facts stated therein, without reference to the averments concerning their legal effect, which are more in the nature of argument than otherwise, it appears that the use of this property, as a highway or landing-place, was given to the public by the plaintiffs' ancestor long prior to the execution of and irrespective of the deeds of 1865 and 1871. At any time thereafter the legislature, as the representative of this public, had the power to authorize the corporation of Portland to improve the premises as a landing, and to make regulations concerning the use of the same, or to make provision to that end directly, or to leave the property in its natural condition, subject to such use, as a landing, as could under the circumstances be made of it. It might also construct, or authorize the corporation or any individual to construct and maintain, wharves and warehouses thereon, and impose and collect a toll for the use of the same, sufficient at least to defray the cost and expense of these aids and conveniences to travel and transit thereon. But neither the state nor Portland has any interest in this property to dispose of; nor can either of them devote or subject it to any use clearly inconsistent with the purpose of the dedication. And if the legislature should undertake to do so, the property would not therefore revert to the donor, or the easement be lost to the public, but any person injured thereby might maintain a suit against the proper parties to enjoin the same. It follows from these premises that, so far as the plaintiffs are concerned, it matters not whether Portland has or ever had any authority to regulate the use of or improve the premises for the purpose of the dedication; or whether it could or did take any interest therein by operation of the deeds of 1865 and 1871.

But it may not be amiss to refer briefly to the legislation bearing on that subject. By the act of 1851, *supra*, as we have seen, Portland was authorized to regulate and improve the "public levees" within its limits, including this one, of course, as well as the bank of the river north of Jefferson street, which was subsequently (1861) found not to have been dedicated, (*Lownsdale v. Portland*, Deady, 2;) and to remove all obstructions therefrom. By the same act (6) the corporation was authorized "to acquire" real property for the use of the corporation. This act was superseded by the one of October 14, 1864, (Sess. Laws, 2,) which dropped the word "levee," and provided, among other things, (section 2,) that the corporation might "purchase, hold, and receive" real property within its limits for "public buildings, public works, and city improvements." This was followed by the act of October 24, 1882, (Sess. Laws, 144,) which was a mere compilation of the act of 1864, and sundry additions and amendments made thereto in the mean time, but made no change in the law in this respect; and section 2 of the act was again amended

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by the act of November 25, 1885, (Sess. Laws, 102,) without being altered in this particular.

From this it appears that since October 14, 1864, if not before, Portland has been authorized "to purchase, hold, and receive" real property for "city improvements." This is a general and comprehensive provision; and unless limited in its operation by some other enactment, to which attention has not been called, it includes property intended for a public square, park, landing, levee, or the like. 2 Dill. Mun. Corp. (3d Ed.) §§ 562-564. And under the grant of power contained in section 37, subds. 1, 2, of the act of 1864, and the following ones, to levy and collect taxes for general municipal purposes, and for "any specific object" within the authority of the corporation, it is not apparent why Portland is not authorized to improve such square, park, landing, or levee in any way that may be calculated to promote its usefulness or improve the city.

The fact that the river front is generally in the hands of private parties, on which wharves and warehouses are maintained by private enterprise, has no bearing on the question of the authority of Portland in the premises, or the power of the legislature to confer, withhold, or withdraw the same at pleasure. What is a wise or the best policy in the premises is a matter for the legislature in the first instance, and the corporation in the second. Under the circumstances, it would be sheer assumption for the court to say that it is contrary to public policy for Portland to have a public landing or levee on the river bank, or to improve and maintain the same, either directly or through the agency of third persons.

The act of February 24, 1885, (Sess. Laws, 100,) which the plaintiffs allege is a "renunciation" by the state of the trust arising from the dedication of this property to public uses, is largely a mass of senseless and redundant verbiage; but so far as this case is concerned, it may be shortly stated as a grant or license to the defendant the Portland & Wallamet Valley Railway Company, then and now engaged in constructing a road between Portland and Dundee, the use of a levee for a depot, and the wharves and warehouses necessary and convenient for receiving, storing, and shipping freight, on condition, among others, that said company shall not charge any vessel for "dockage" while receiving or discharging cargo at any wharf on the premises.

The act also contains a provision to the effect that nothing therein shall be construed "to take away any pecuniary (?) or property rights" that Portland may have in the premises, and which the state cannot "lawfully appropriate;" nor to deprive the same of any "legal claim or remedy it may have to (?) damages in consequence of the appropriation of said public levee;" and that the company shall not sell or assign "the premises or rights" thereby granted, otherwise than as an "appurtenant" of said railway. As the state has no power to "appropriate" or "grant" this property otherwise than to provide for and

regulate its use as a public landing, the language of the act is not well chosen, and is susceptible of a construction that would give it effect beyond the power of the legislature in the premises. But giving it effect within such power, and construing it accordingly, as the court is bound to do, if it can, the act is a grant to the defendant of the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith. The company is so far the agent of the state; and in consideration of the advantage of being allowed access to ship navigation at this point, and the right to maintain a depot thereat, undertakes to furnish the public with suitable wharf and warehouse facilities there for the transaction of business, including free "dockage" for vessels engaged in loading or discharging cargo. And as Portland has no "pecuniary" or other right in this property, except as trustee, and then only so far as the legislature may provide or permit, it is not apparent what claim it can have for damages in consequence of its "appropriation" to such uses and purposes. 2 Dill. Mun. Corp. (3d Ed.) §§ 567-573.

Nor is it apparent how the operation of this act impairs the obligation of any contract concerning this property, and especially to the injury or prejudice of these plaintiffs; for no one can be heard to question the validity of an act of the legislature on the ground that it impairs the obligation of a contract, without showing that such impairment works an injury to him of which the law will take cognizance. The learned counsel for the plaintiffs states their case in this respect on this wise:

"In the case at bar the federal question of the power of the legislature to devote the property to the railroad's use, forms an ingredient in the original cause of suit. The right of reversion to the donor or his heirs, and the power of the legislature to destroy that right of reversion, are the principal points in the case; and a determination of the power of the legislature is indispensable to a determination of the suit upon the other point. The relief prayed for will be allowed or rejected according to whether the act be determined to be valid or invalid."

But if the act is invalid for any cause, no one can claim any right under it, and for the same reason no one can be deprived of any right by it. The argument involves the novel proposition that the legislature, by the passage of a void act, whereby it undertook to divert the use of this property from the public to a private corporation, has caused the right of the public therein to be forfeited, and the property to revert to the donor or his heirs, discharged from the easement. This is making one person answer for the sins of another, with a vengeance. The mere statement of the proposition ought to be a sufficient answer to it. The public, to whom the use of this property was dedicated by Stephen Coffin, is not responsible for the illegal acts of the legislature; and for that matter they do not bind or affect any one.

But it is not conceded that there is any implied contract accompanying or growing out of this dedication; that the public will make any particular use of the premises, except when and as it may suit its convenience or the public good; nor that the same shall revert to the donor or his heirs in case of any failure of the public to use the same, or any attempt on the part of the state or Portland to divert the property to some use other than the one intended by the donor. Where the fact of dedication of a street or landing is in dispute, non-user is evidence, more or less cogent, according to circumstances, against a dedication. But where, as in this case, the dedication is admitted, the evidence of non-user is immaterial. The right to the use, once admitted, is not affected by it. *Barclay v. Howell*, 6 Pet. 505. Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible; and if such property is appropriated to an unauthorized use, a court of equity will compel a specific execution of the trust, by restraining the parties engaged in the unlawful use or by causing the removal of obstructions or hindrances to the lawful one. *Barclay v. Howell*, 6 Pet. 507. See, also, 2 Dill. Mun. Corp. (3d Ed.) § 653.

The bill is clearly without equity; and, in my judgment, the case made by it does not involve a federal question.

The demurrer to the bill is sustained, and the same is dismissed.

CLAFLIN and others v. LISSO and others. (Consolidated Cases.)¹

(Circuit Court, E. D. Louisiana. March, 1886.)

1. FRAUDULENT CONVEYANCE — REVOCATORY ACTION UNDER CIVIL CODE OF LOUISIANA.

Under the Civil Code of Louisiana the judgment in the revocatory action instituted by creditors to set aside a fraudulent conveyance, if the action be successful, is that the conveyance be avoided as to its effects on the complaining creditors, and that all the property or money taken from the original debtor's estate by virtue thereof, or the value of such property, to the amount of the debt, be applied to the payment of the complaining creditors.

2. SAME—IN EQUITY.

The same rule will be applied in equity in the circuit court of the United States with respect to property in Louisiana, the complaining creditors being citizens of other states.

3. SAME—WIFE'S LEGAL MORTGAGE.

The lien of a "legal mortgage" in Louisiana to secure a debt due by the husband to the wife affects third persons only from the date of its recordation, and attaches only to property in the parish belonging to the husband, or therein and thereafter acquired by him. When, therefore, after a fraudulent conveyance to the wife by the husband, she records her debt, her lien as mortgagee does not attach to the property theretofore conveyed, which, as between the spouses, belongs to her, and not to him.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

4. SAME—FRAUDULENT CONVEYANCE TO WIFE.

Such fraudulent conveyance being set aside at the suit of complaining creditors, is set aside as to them primarily, and the property thus unmasked, or its proceeds or value, will be applied by preference to their claims. The same result would be reached, substantially, on general principles of equity.¹

In Chancery.

The complainants, citizens of Massachusetts, and New York, filed suits in the state court of Louisiana, which were revocatory in their character, to set aside, *inter alia*, a conveyance from the defendant J. H. Scheen to his wife, as made in fraud of creditors. The suits were removed by them to the United States circuit court, and proceeded as to the demands for revocation on the chancery side, where they were consolidated. Under the Louisiana Code such suits may be instituted either by judgment creditors or by those creditors not having judgments, who join their debtors as parties with the alleged fraudulent grantee. Civil Code La. 1972. The theory of the decree in such a suit, as stated in the Code, is that the conveyance, if the action be successful, is set aside as to the complaining creditors, who thus acquire a preferential right to have the property applied to their claims as established. Civil Code, 1982. Counsel for complainants stated that this rule of preference did not exist under the Code Napoleon, but was probably introduced into the Code of Louisiana by Mr. Livingston, who had been an equity lawyer in New York.

W. W. Howe, for complainants.

W. H. Rogers, for Mrs. Scheen.

- PARDEE, J. On January 22, 1883, the following decree was rendered in this case:

"* * * * Second. That as to the act of conveyance or *dation en paiement*, recited in the bills of complaint herein made by the defendant John H. Scheen unto the defendant Nancy A. Bradley, his wife, by act passed before D. H. Hayes, notary, parish of Red River, November 23, 1878, and filed for record and recorded in said parish in Conveyance and Mortgage Books the same day, and whereof a certified copy has been filed as an exhibit herein November 26, 1879, and is now annexed hereto as part hereof, be, and the same hereby is, in all things revoked, annulled, and set aside; and the property therein described, and purporting thereby to be conveyed to said Mrs. Nancy A. Bradley, wife of John H. Scheen, declared to have been the property of said John H. Scheen at the time the bills of complaint herein were filed, to-wit, November 13, 1879; and is hereby subjected to the just claims, demands, and judgments of complainants herein, subject to provisions hereinafter made; which judgments herein against said Julius Lisso and John H. Scheen, *in solido*, are as follows: *H. B. Claflin & Co. v. Lisso & Scheen*, (No. 8,883 of the docket of this court,) \$9,580 40-100, with interest thereon set forth; *H. Bernheim & August v. Lisso & Scheen*, (No. 8,880,) \$655.38, with interest as thereon set forth; *August, Bernheim & Bauer v. Lisso & Scheen*, (No. 8,881,) \$2,326.36, with interest as thereon set forth; *Claflin & Thayer v. Lisso & Scheen*, (No. 8,882,) \$2,298.57, with interest as thereon set forth. And it is further ordered that any mortgage claims which Mrs. Scheen may

¹See note at end of case.

have against said property described in said deed of November 23, 1878, be, and the same hereby are, reserved for further decision. * * *

On the same day as the said decree the complainants filed a supplemental bill, alleging that Mrs. Scheen sets up some claim by way of mortgage on the property described in the conveyance annulled by the decree, which alleged mortgage claims are *null and void*, particularly against complainants, and asking that Mrs. Scheen have notice, and that her said mortgage claims may be declared void as to the demands and preferences of complainants. Thereupon Mrs. Scheen interposed a plea to the jurisdiction, based on the insolvency proceedings in the state court, which plea was overruled December 26, 1883, and on April 7, 1884, an answer was filed, and thereafter a cross-bill. In both the answer and cross-bill is set up an indebtedness of Scheen, the husband, to defendant, for paraphernal property coming to his hands and used by him, a wife's mortgage resulting therefrom, and a recordation thereof in the parish of Red River, April 30, 1879, and in the parish of Bienville, June 6, 1879. It is further averred that said indebtedness has been recognized and adjudicated in her favor, with recognition of her legal mortgage, in the state courts of Louisiana, in a suit against her husband and the syndic in the insolvency proceedings of Lisso & Scheen; and the insolvency proceedings in *Re Lisso & Scheen* are fully set forth, with averments that complainants are ordinary creditors of Lisso & Scheen, and are subordinated to the individual creditors of Scheen, so far as Scheen's individual property is concerned.

Demurrers have been filed to the answer and cross-bill, and the matter now for decision arises on said demurrers.

The decree of January 22, 1883, settled the rights of the parties to the property described in the revoked conveyance, making two reservations,—one in favor of any mortgage rights bearing on the property that Mrs. Scheen might have, and one as to the question of priority between complainants and the syndic of Lisso & Scheen. The latter matter has passed out of the case by decree in favor of complainants, rendered December 26, 1883. The decree of January 22, 1883, settles that the complainants are judgment creditors of Lisso & Scheen, and have, for the satisfaction of their judgments, an equitable lien on the property described. The answer and cross-bill aver a legal mortgage of Mrs. Scheen bearing on the same property, and the demurrers admit such a mortgage. The question, then, presented to the court is one of priority.

It is too late to deny that complainants have any lien, and also to argue as to the effect of the insolvency proceedings on the jurisdiction of the court, etc. These questions have been settled by the decrees aforesaid contradictorily with Mrs. Scheen, and for the purposes of this matter are to be taken as well settled. Certainly they are not to be reversed in a collateral way. The proceedings in the state court recognizing Mrs. Scheen's legal mortgage are *res inter alios acta* as to

complainants, and not binding on them. The plaintiffs commenced their revocatory actions in December, 1878, obtained their judgments at the November term, 1879, and the decree declaring their lien, January 22, 1883. It is probable, under this state of facts, that the question of priority might be settled in complainants' favor by mere reference to dates, as the legal mortgage of Mrs. Scheen was not recorded until long after the institution of complainants' revocatory actions, to which Mrs. Scheen was a party. If the lien of complainants under said decree of January 22, 1883, relates back to and dates from the institution of the revocatory action, the complainants are prior in time, and entitled to priority of lien. See *Corning v. White*, 2 Paige, 567; *Hayden v. Bucklin*, 9 Paige, 512. However this may be, of which I express no opinion, I think the complainants have a clear priority of lien on the facts of the case as submitted to the court.

Under the stipulation on file, the cause is submitted on bills, answers, and demurrers, the effect of which is that the facts averred in the answers are admitted, and that those facts averred in the complainants' bills not denied nor avoided are admitted. The court takes judicial notice of the decrees and orders of court made in the case. From these sources it appears that the firm of Lisso & Scheen was indebted in large sums to complainants; that being involved, and perhaps insolvent, both members of the firm made conveyance of property, partnership and individual, to their respective wives, particularly that Scheen conveyed to his wife, under the form of a *dation en paiement*, certain real estate described; that the complainants commenced suits in December, 1878, against Lisso & Scheen, in the district court in the parish of Red River, by attachment and revocatory action combined, which suits were removed to this court, transcripts being filed here November 3, 1879. In this court the attachments went on the law side, resulting in a dismissal of the attachments, but in judgments for the debts. The revocatory action went on the equity docket, the pleadings were recast, and the decree of January 22, 1883, resulted. Mrs. Scheen recorded her legal mortgage against her husband in April, 1879, and her contention is that as her mortgage was recorded prior to the recovery of complainants' judgments, that it has priority over complainants' lien on the property recovered in the decree of January 22, 1883.

As to the complainants, Mrs. Scheen had no mortgage on her husband's property prior to the recordation of the same, and it did not, as against complainants, attach to the property in suit here when recorded, because at that time Scheen, the husband, had no interest in or ownership of the said property. From the date of the deed from Scheen to Mrs. Scheen until the decree of January 22, 1883, the said property stood in the name of Mrs. Scheen, and was hers to all the world except complainants. The decree of 1883, as resulting from the revocatory action, set aside Mrs. Scheen's title in favor of complainants, but in favor of no one else,—least of all, her husband,

Scheen. This is the direct effect to be given the revocatory action in this state, which action was the one instituted by the complaining creditors, prosecuted in this court according to the equity rules and practice. See R. C. C. § 1977; *Townsend v. Miller*, 7 La. Ann. 633.

At the institution of complainants' suits this property stood in the name of Mrs. Scheen, owner. So far as the facts of this case go, it still stands in the name of Mrs. Scheen, owner, except as to complainants, and Mrs. Scheen, mortgagee, has no standing under Louisiana law to dispute priority with complainants. But for the confusion of mind resulting from the fact that Mrs. Scheen, grantee in the fraudulent conveyance, and Mrs. Scheen, wife of grantor in said conveyance and mortgagee, are one and the same person, the matter would appear to be too plain for argument. Under general equity principles the case seems equally conclusive.

As at the time of record of Mrs. Scheen's mortgage the property did not belong to her husband, the mortgage did not attach until the property was subsequently restored to Scheen by the decree of January 22, 1883, declaring the conveyance to Mrs. Scheen null and void; but at such restoration to Scheen, and as a condition of restoration, it was burdened with the lien of complainants' judgments. Mrs. Scheen, as mortgagee of the subsequently acquired property of her husband, could get no priority over the complainant creditors whose diligence had unmasked her fraudulent title, and had restored the property to her husband's estate. See *Lyon v. Robbins*, 46 Ill. 276; *Miller v. Sherry*, 2 Wall. 249; *In re Estes*, 3 Fed. Rep. 134.

The demurrers in this case are sustained.

NOTE.

For a full discussion of the question of fraudulent conveyances generally, see *Platt v. Schreyer*, 25 Fed. Rep. 83, and note, 87-94.

Respecting fraudulent conveyances to wife, see note to *Platt v. Schreyer*, ¶ (2) of § 2, pages 89, 90.

SCHULER v. LACLEDE BANK and others.¹

(Circuit Court, E. D. Missouri. April 12, 1886.)

1. BANKS AND BANKING—CHECKS—NOTICE.

A check does not operate as an equitable assignment of any portion of the drawer's deposit, as against the bank, until the bank is notified that it has been drawn.²

2. SAME—EQUITABLE ASSIGNMENT.

Where the drawer of a check becomes insolvent, and makes a general assignment before the check is presented, the check will operate as an equitable assignment of the amount drawn for, as against the general assignee.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

² See note at end of case.

3. SAME—WHERE DRAWER IS ONE OF SEVERAL BANKS OWNED BY SAME MAN, BUT HAVING SEPARATE ACCOUNTS WITH DRAWEE.

Where the same man owns several banks, each having a separate account with still another bank, a check drawn by one of his banks upon the outside bank will not operate as an assignment of any portion of the accounts of his other banks.

4. SAME—EQUITIES AS BETWEEN BANK AND CHECK-HOLDER.

As between a bank holding a note which is due and the payee of a check, drawn by the maker of the note, the equities are in favor of the bank.

5. SAME—DEPOSITOR'S NOTE.

Where a bank holds a depositor's note, it has a right, at any time during the day on which it falls due, to apply funds in its hands belonging to the maker to the payment of the note, even where nothing will be left to the maker's credit to apply on checks.

6. EQUITY—TRUSTS.

Where a trust fund can be traced, equity will follow it.

In Equity.

Dyer, Lee & Ellis, for complainant.

Boyle, Adams & McKeighan, for defendants.

BREWER, J., (*orally*.) In the case of Schuler against the Laclede Bank, which was submitted upon bill, answer, and agreed statement of facts, the suit is brought by the plaintiff as the payee of a check drawn by Israel & Co. on the defendant the Laclede Bank. The check, drawn October 20th, was presented October 26th. Israel & Co. failed, and made an assignment on October 24th, of which notice had been received by the Laclede Bank, who declined paying.

The first question is whether an action at law or a suit in equity can be maintained by the payee of such a check against the drawee, under any circumstances, and, if so, under what. That no action at law can be maintained in the federal courts is clear. In the case of *Bank v. Millard*, 10 Wall. 152, the supreme court held that "the holder of a bank-check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer." The same doctrine was affirmed in a later case of *Bank v. Whitman*, 94 U. S. 343. "The payee of a check, before it is accepted by the drawee, cannot maintain an action upon it against the holder, as there is no privity of contract between them."

In the case of *Christmas v. Russell*, 14 Wall. 69, in reference to what constitutes this matter as to whether there is an equitable assignment, the court say:

"The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee."

In 2 Daniel, Neg. Inst. § 1638, the author, who criticises this doctrine of the supreme court, states that "it is universally understood between banks of deposit, arising from the customs of trade, that the check

of the holder is to be paid upon presentation. The United States supreme court so declares in a recent opinion, though, as yet, it has not followed that declaration to its logical sequence;" citing *Central Bank v. Life Ins. Co.*, [104 U. S. 54,] decided in 1881. That logical sequence, as he contends, would be that such a check operates as an equitable assignment, and that a suit in equity can be maintained thereon.

These are the chief rulings and expressions of opinion on the part of the supreme court in this respect. I think it is clear from them that no action at law, and no suit in equity, can be maintained upon the mere possession of such a check; that there must be, besides the possession of the check, some other circumstances which either create a contract between the payee and the bank or which equitably require that the funds in the possession of the bank should be appropriated to the payment of the particular check.

Over against these decisions of the supreme court I find these in this circuit: One in the case of *Walker v. Seigel*, reported in 2 Cent. Law J. 508, in which my Brother TREAT states the rule thus:

"An order drawn on a general or particular fund for a part only does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts. That rule, as thus broadly stated, seems to apply only to cases at law. Such an order, so soon as notice is given to the drawee, works an assignment in equity."

In *German Sav. Inst. v. Adae*, 1 McCrary, 501, S. C. 8 Fed. Rep. 106, after the insolvency of, and a general assignment by, the drawer, the bank came into this court by a bill of interpleader and tendered the money, brought in the payee and the assignee of the drawer, and asked the court to dispose of the fund; and the court, holding possession of the fund, as between the drawer of the check and the payee declared that the payee was entitled to it, and so gave judgment.

In a still later case of *First Nat. Bank v. Coates*, reported in 8 Fed. Rep. 540, the Mastin Bank had drawn on the Metropolitan Bank of New York several checks. On presentation, the Metropolitan Bank refused to pay, having previously received notice of an assignment by the Mastin Bank, and turned the money over to the assignee, Coates. These various check-holders then brought a suit in equity against the assignee having possession of this money, claiming that, as between themselves and the assignee who represented the drawer, they had an equity upon it superior to the general creditors of the Mastin Bank; and Justice MILLER, the presiding justice of this circuit, held that they had, and in the course of the opinion he says:

"The question here is whether this is an appropriation in equity of that much of that fund in favor of the payee. It is said it is not, because the payee or holder of the check cannot bring suit against the bank for money, and therefore it is not an equitable assignment of that much money. But that argument is founded on a misconception or want of proper conception of the doctrine of equitable assignments. The very words 'equitable assignment' are used because the assignment is only recognized in a court of equity, and

not a court of law. If it were recognized in a court of law, it could be enforced there, and we would never have heard of any such words as 'equitable assignment.' Therefore it is an assignment of that much of the debt, which a court of equity will recognize and a court of law will not."

And further on he says:

"The philosophy of it is that this fund, having been appropriated by these checks duly presented, did not pass by the assignment; that the fund on which they were drawn, to that extent, did not pass by the assignment as the general property of the bank into the hands of Coates, but when he got it he held it subject to the lien established on it. The result of that is that these drafts are each of them an appropriation of that much of the fund, and the complainants are entitled to recover the amount."

That justifies me in the conclusion which I have just expressed, that no suit in equity ever can be maintained upon the mere possession and production of the check by the payee; that there must be some equitable circumstances to justify the court in seizing that fund and giving it to the payee. One of those equitable circumstances is the insolvency of the drawer; because, when the drawer becomes insolvent, the question is whether that money shall be paid over to the payee to whom the drawer has directly appropriated it or distributed generally among his creditors, and it would seem to be equitable that the party in favor of whom the appropriation has been made should be preferred to those creditors who are merely general creditors, and in whose favor no such appropriation has been made. That rule applies in this case. So, also, I think there is some room for the application of the principle that where a fund can be traced equity will follow it. I do not mean to say that there is the fullest room for the application of that principle. The facts are that the cashier of Israel & Co., the drawer of this check, held a note belonging to the plaintiff for collection. He received in part payment thereof a check for \$12,500, drawn upon a bank at Fort Worth. He received this as the agent of the plaintiff, the owner of the note. He sent that check to the bank at Fort Worth, with directions to deposit the same to the account of Israel & Co., and then, within a day or two, directed \$7,000 of that money to be transferred to the Laclede Bank, which was done, and in a roundabout way some more was also transferred to the Laclede Bank; so that, practically, the money collected on that note went to the Laclede Bank, and made the fund there to the credit of Israel & Co. at the time this check was presented. I think for both these reasons the payee of the check is entitled to maintain this suit.

A further question then arises upon these facts: Israel & Co., on the morning of October 24th, had on deposit in the Laclede Bank twelve thousand and odd dollars. On that day they assigned. Three months before they had discounted with the Laclede Bank a note of \$6,500, which, by its terms, would become due on October 26th. Prior to the 24th they forwarded to the Laclede Bank a new note for \$6,500, dated October 24th, as a renewal of the former note. The

Laclede Bank, on October 24th, the day this new note was received, charged up the old note to the account of Israel & Co., but did not discount the new note,—at least, they did not enter it on the books, and had not formally resolved to discount it. So it stood on the morning of the 26th. On that morning, prior to opening of the bank, they received telegraphic notice of the assignment, and of course declined to discount the new note. At a quarter past 10 this check was presented. Now, the bank insists that this note was due on the 26th; that, having funds in its possession, it was at liberty to charge up that note as against those funds; and that, therefore, prior to the presentation of this check, Israel & Co.'s account was reduced to that extent. On the other hand, it is claimed that the note was not payable until the close of the day of October 26th, and therefore that this check was presented before the note was payable.

This question must be solved in a court of equity, upon equitable grounds, and I think that it is equitable for a bank, upon the day on which a note becomes due, and at any time during the day, having funds of the maker in its possession, to apply those funds to the payment of that note, although by so doing it leaves nothing standing to the credit of the maker to apply on checks drawn by him. As between the bank, the holder of a note due, and the payee of a check upon that bank, the equities are in favor of the bank. Or, at least, if the equities are equal, legal title to the funds and possession is with the bank, and it should not be postponed.

This only brings me to another question. J. M. Israel was the sole owner of the Bank of C. W. Israel & Co. He was also sole owner of the Exchange Bank of Harold, located in another city, and of the Exchange Bank of Wichitaw Falls, located in still another place. Each of these three banks owned by J. M. Israel, doing business under a separate name, had a separate account with the Laclede Bank. Does the drawing of this check by the Bank of C. W. Israel & Co. operate in any way as an equitable assignment to the payee of the check of any portion of the accounts of these other banks, upon the simple ground that the same man is proprietor of all three? I think not. The equitable assignment created by the drawing of a check does not give rise to anything in the nature of a garnishment upon the bank. Supposing the Laclede Bank, having this account with Israel & Co., had also in its possession a stock of merchandise belonging to Israel & Co., could it for a moment be claimed that the drawing and presentment of this check would have operated to give a lien upon the stock of goods, or to charge it in any way as a garnishee? It seems to me all that can be claimed in respect to such a check is that it operates as an equitable assignment of the fund on which it is drawn, and to the extent only that the fund remains in the possession of the drawee at the time it is presented.

In that view of the case, it is unnecessary to inquire as to the state of the account of these other banks, or what would be the claim

of the assignee as against the Laclede Bank. The account of Israel & Co. was \$12,412.41, less the \$6,500,—the note charged up on the 24th,—leaving a balance of \$5,912.41 subject to the check at the time it was presented, and for that amount, with legal interest from the date of demand, the plaintiff may take decree.

NOTE.

It is said by the supreme court of Illinois, in the case of *National Bank of America v. Indiana Banking Co.*, 2 N. E. Rep. 401, that a check drawn on a bank operates as an assignment of the funds of the drawer to the amount for which the check is drawn.

Notwithstanding the agreement which bankers make with their customers to pay their checks to the amount standing to their credit, a checkholder can take no benefit from this agreement, and a check does not operate as a transfer or assignment of any part of the debt, or create a lien at law or in equity upon the deposit. *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82.

There is no privity of contract between the holder of a check and the bank on which it is drawn, and a refusal to pay the check would not give the holder a right of action against the bank. *Case v. Henderson*, 23 La. Ann. 49.

Where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and a transfer of the check carries with it the title to the amount named in the check to each successive holder. *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212.

A check in the ordinary form does not operate as an assignment of so much of the drawer's funds in the drawee's hands. *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325.

No action can be maintained, on an unaccepted check, against the drawee. *National Bank of Rockville v. Second Nat. Bank of Lafayette*, 69 Ind. 479.

No action lies, in favor of the transferee of an accepted check, against the bank on which it is drawn. *Colorado Nat. Bank of Denver v. Boettcher*, 5 Colo. 185.

PARTEE v. THOMAS and others.

(Circuit Court, W. D. Tennessee. April, 1886.)

EQUITY—COSTS—DOCKET FEE—ATTORNEY'S DOCKET FEE TAXABLE ON DISMISSAL FOR WANT OF PROSECUTION.

Where a suit had abated, after demurrer overruled and answer filed, by the death of the plaintiff, and subsequently there was granted a motion by defendant to dismiss for want of prosecution, *held*, that the attorney's docket fee of \$20 was taxable under a decree awarding the defendant his costs.

Motion to Retax Costs.

Clapp & Beard, for the motion.

W. D. Cardwell and Pitts & Hays, contra.

HAMMOND, J. I do not feel called upon here to reverse, as I am asked to do, the opinion expressed in *Goodyear v. Sawyer*, 17 Fed. Rep. 2. That case called attention to the conflict of authority on the point whether, upon the voluntary dismissal of a suit in equity after answer filed, etc., the solicitor's docket fee be taxable under Rev. St. §§ 824, 823, and 983. It sought to find some principle of interpretation for statutory language which is somewhat obscure in itself,

susceptible perhaps of varying significations, and as to which it is altogether probable that the persons who framed and passed the statute had no precise conception of its exact meaning. Following the ordinary course that courts take out of such difficulties, I endeavored to apply, as best I could, to the interpretation of a statute relating to costs of suits in equity the meaning of the terms "on final hearing," as understood in that particular branch of the law at the time of the passage of the statute and anterior thereto. The truth is, it is a rather loose expression familiar to equity lawyers of that day, and used to designate that final disposition of a case which ended it, and ordinarily resulted in a decree for costs. It might come after issue; it might come before,—whatever disposed of the case was the "*final hearing*." It was used in contradistinction to all that which preceded this final result, and which was deemed, in a large sense, interlocutory.

It might be that proceeding which was known in a strictly technical sense as "the hearing,"—not the *final* hearing,—or it might not, according to circumstances. The technical practice of the English court of chancery had been greatly modified by statute, more by custom; and all its terminology was loosely applied. These words "*final hearing*" came into use to distinguish from "*the hearing*" that last expiring proceeding which generally disposed of the costs. I wish to quote here briefly from chapter 27 of the first edition of Daniell's Chancery Practice, and refer, without quotation, to the opening paragraphs of the preceding chapter; the one being the opening chapter of volume 3 of the original work, and the other the final chapter of volume 2. And, before making the quotation, I refer to Mr. Justice BRADLEY's note to *Thomson v. Wooster*, 114 U. S. 112, S. C. 5 Sup. Ct. Rep. 792, to my own note to *U. S. v. Anon.*, 21 Fed. Rep. 766, and to the learned Chancellor COOPER's note to the corresponding chapter of Daniell, in the fifth American edition, volume 2, p. 1376. These notes will explain the importance of the following quotation, and generally emphasize the necessity, in our federal practice, of caution in these matters not to be misled by implications based on mere words, overlooking the constant changes that legal terminology undergoes in the peculiarities of our American systems. Mr. Daniell says:

"As it is the usual practice of the court, where, upon the hearing, it directs either an issue or a case or a reference to a master, not to give any directions upon the subject of costs till after the verdict or certificate of the judges has come in, or till the master has made his report, (a practice which appears to have been adopted for the purpose of accelerating the *final termination* of the suit,) it generally happens that the costs of the suit are taken into consideration at the time when the cause comes on *for hearing for further directions*, and that on such occasions, as soon as the further directions are disposed of, the court makes such order with regard to the costs as it thinks the justice of the case requires," etc.

This was the "*final hearing*," and the books of practice give abundant evidence that there was good cause for falling into the habit of

using this phrase to express and distinguish a possible and often occurring proceeding which came after "*the hearing*;" that is to say, after "that submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or the libellant has made out the case stated by him in his bill or libel as the ground for the permanent relief which his pleading seeks, on such proofs as the parties place before the court, be the case one of *pro confesso*, or bill, or libel and answer, or pleadings alone, or pleadings and proof." *Wooster v. Handy*, 23 Fed. Rep. 56. Most deferentially I submit that the words of the statute do not necessarily imply that ceremony which is described by the last above quotation. They may describe that, of course, if it happen to be in fact the final hearing; but generally they do not, but rather that other hearing described by Mr. Daniell in the above extract, which *finally* terminates the case; and it is "*on*" this final hearing, but not *for* it that the attorney's fee is taxable, and it is not taxable *before* that time. It is the confusion of these two hearings that causes the trouble in these cases.

If we examine the law of costs in courts of equity,—and that branch of it was as well understood as others,—we can see why the statute preferred to allow a lump sum at the end of the suit to undertaking to regulate allowances on interlocutory proceedings for solicitor's costs, and determining at the *final* hearing what should be decreed, in that behalf, *to the parties to the suit, as against each other*. The notion that congress, in the midst of that law, intended to ignore all other services, and give the lawyer a fee of \$20 for the particular labor of ceremoniously *trying the case* on its merits, no matter how much or how little, but necessarily *always some little*, seems untenable, to say the least of it. Combining the law of costs in all departments, and taking the statute as a whole, it seems to be a reasonable construction to hold that congress intended to abolish the idea of giving particular fees for particular services of the lawyer, itemized somewhat like a grocer's bill, and at the end to allow the party, *on the score of attorney's costs*, an aggregate sum of money, not at all for any particular service, but *for all that was done in the case from beginning to end*: In cases at law, if there had been a trial by jury, \$20; not for a trial by jury, but in a case tried by jury, for all services rendered, \$20. If there be judgment without a jury, \$10; not \$10 for the ceremony of taking a judgment without a jury, but for all services in the case, that sum. If the case be discontinued, \$5; not for the discontinuance itself, but for the entire service in a discontinued case.

But in all equity and admiralty cases, (with the exception mentioned in the proviso,) because of their peculiarities and comparatively larger amount of professional work, this plan of gradation was dropped, and, when finally disposed of, \$20 were allowed on the score of attorney's costs, whether tried before a jury, as they might be, or

not, as they generally are,—whether disposed of in one way or another,—so that they are *finally* heard, or, in other words, *ended*. The contrary doctrine reverses this plan of allowing one sum for all services, and relegates the allowance to one fee—and a very large one it may be under some circumstances—for a particular service, which is often the slightest in the case, and that, too, the most difficult of ascertaining and defining; for, it is often impossible to tell whether a given state of facts constitute “a trial before a jury” or “a final hearing,” or not; and, besides, we must, on that theory, go beyond the record, and determine *aliunde* whether the fee be chargeable, by ascertaining somehow by evidence whether the particular service was in fact rendered. It establishes the manifest injustice of refusing any allowance, in equity and admiralty cases, after the work is all done, if the plaintiff chooses to dismiss a lost cause, in order to evade the fee, rather than submit it for formal decision,—a result not possible in law cases, and as to which there is no reason for so singular a distinction. The fallacy consists in looking at the act as giving a fee to the lawyer for a specific item of service, when it is an allowance to the party to the suit in lieu of a bill of costs taxable before that time, and including many different items of attorney’s taxable costs. Construed as this opinion contrues it, there need never be any doubt about the taxable costs for attorney’s fees due the parties in any case, and the statute is homogeneous as to attorney’s costs to be taxed in all branches of the jurisdiction. Construed the other way, it is always hard to tell whether the fee should be taxed in equity and admiralty cases; it works injustice in many of them, establishes senseless distinctions, and involves much confusion.

I have not the least doubt that congress meant to give, in every equity and admiralty case, a taxed fee of \$20 whenever and however it was finally ended, with the single exception specifically mentioned in the statute, and that it did not intend to merely provide a fee for the ceremony of trying the case before the judge on its merits, leaving all other services unprovided for, and without any fee at all, and devolving upon the court in those cases to determine, on facts not in the record, whether or not they were so far tried “on the merits” as to be charged for in the bill of costs; and thus substituting those words “tried on the merits” for “final hearing,” as used in the statute. I have the word of the original author of the statute, then a representative and now a senator in congress, for the construction I give the act. He thinks the case of *Goodyear v. Sawyer*, *supra*, correctly construes it; and while, of course, this is no technical support for that case, it gratifies me to know that he approves it, for he is a competent and trustworthy interpreter of that statute, and an able lawyer.

Nevertheless, since my brethren elsewhere have not approved that ruling, and uniformity of practice may be of more importance than consistency or even correctness of judgment, I shall, when the point again arises, consider whether I should abandon my own matured con-

victions, and conform our practice to that of other courts by a reversal of that opinion, in deference to theirs. *Wooster v. Handy*, 23 Fed. Rep. 49; *Mercartney v. Crittenden*, 24 Fed. Rep. 401; *Consolidated, etc., Co. v. American, etc., Co.*, Id. 658. But see *Andrews v. Cole*, 20 Fed. Rep. 410.

Plausible, however, as is the suggestion that I shall now reverse it, I do not think this case requires that course, and I reserve the point for further reflection. Here the facts are that the case was dismissed for want of prosecution, *on motion of the defendants*, with full notice and under peculiar circumstances, not at all like any of the other cases. In *Mercartney v. Crittenden*, *supra*, the plaintiff dismissed the bill voluntarily, after demurrer overruled and answer filed. In *McLean v. Clark*, 23 Fed. Rep. 861, there was a demurrer overruled and answer filed, the fee being claimed, as if upon a final hearing; and it was properly denied, since the case did not, as in *Price v. Coleman*, 22 Fed. Rep. 694, go off upon demurrer without further proceedings. But in this case, when the demurrer was overruled, as reported in *Partee v. Thomas*, 11 Fed. Rep. 769, an answer was filed and the cause stood at issue. The plaintiff subsequently died. The suit thus became defective, but what was the precise technical effect of the death upon the right of the defendant as to costs, or how it might be properly cleared from the docket, if at all, without revivor, may be doubtful. Beames, Eq. Costs, 195; 2 Daniell, Ch. Pr. (1st Ed.) 359, 360; Id. (5th Ed.) 1506 *et seq.* We were relieved from the consideration of the matter of proper practice in that regard by the action of the parties. Following the state practice, (as is generally done, without objection, in all doubtful emergencies, notwithstanding equity rule 90,) the defendants suggested and proved the death of the plaintiff, and gave notice to the personal representatives, or heirs at law, and to counsel of record, of a motion to dismiss for want of prosecution, if a revivor should not be had. The representatives not desiring to revive, and being willing that the case should be thus disposed of, the motion was granted, and there was a judgment against them and the surety on the cost-bond for costs. It is impossible to say certainly how far the doctrine that there must be "a trial on the merits" to entitle the parties to a taxation of the docket fee is to be pressed in this direction, or how far, operating in that way, it shall properly go in denying the fee in a case like this, where work has been thoroughly done, which ought to give it to the party to whom costs have been awarded; for in *Wooster v. Handy*, *supra*, it is carried in an opposite direction, to the extent of giving more than one fee in a single case, and establishing that very many docket fees may be allowed, if very many "final hearings" should be had, in the same case. But since no case cited is a precedent for this, and being uncertain how to apply the principle contended for so that it shall operate uniformly in all directions with reasonable satisfaction to a sense of justice to those concerned or interested in the bill of costs, I feel, with my convic-

tions of the meaning of the statute, that, while I should possibly follow the precedents in judgment, I should not lead them beyond the strict limits they define by their own peculiar facts. Motion disallowed.

ST. PAUL ROLLER-MILL CO. v. GREAT WESTERN DESPATCH CO.

(Circuit Court, D. Minnesota. April, 1886.)

1. SALE—BILL OF LADING—DRAFT FOR PRICE OF GOODS—"ACCEPTANCE AND COLLECTION."

A bill of lading deliverable to the order of the shipper, and attached to a draft drawn upon the purchaser, and sent to a bank "for acceptance and collection," with no other instructions, is rightfully delivered by the bank on acceptance of the draft, and passes the title to the goods, and the bank need not hold the bill of lading until payment.

2. SAME—STOPPAGE IN TRANSITU—BILL OF LADING—INDORSEE FOR VALUE—ANTECEDENT DEBT.

A consignor who, on discovery of the purchaser's insolvency, has notified the defendant not to deliver goods to him or his assigns, has no right of stoppage *in transitu*, as against an indorsee of the bill of lading for valuable consideration, even though such valuable consideration be an antecedent debt.¹

3. SAME—BILL OF LADING—ORDER OF SHIPPER—DELIVERY UNINDORSED—TITLE TO PROPERTY.

A bill of lading, running to the order of the shipper, being delivered unindorsed to the purchaser by the shipper's agent, with intent to pass the title, transfers the title to the property as absolutely as would a bill of sale.

Demurrer to Amended Complaint.

On November 17, 1883, the plaintiff shipped a car-load of flour at St. Paul, Minnesota, by the defendant's transportation line, consigned to itself at Boston, and took a bill of lading therefor showing such consignment. On the same day plaintiff made its draft, at 15 days' sight, against the flour mentioned in the bill of lading upon one Whitcomb, of Boston, and forwarded the draft, with the bill of lading attached, unindorsed, to the Tremont National Bank of Boston "for acceptance and collection." Upon presentation, November 22nd, Whitcomb accepted the draft, and received the bill of lading from the bank without indorsement. He afterwards indorsed and transferred the bill of lading to the National Bank of Redemption for an antecedent debt which he owed said bank. Such transfer of the bill of lading by Whitcomb was not in full payment or satisfaction of the antecedent debt, but with the understanding that the bank should sell the flour on its arrival in Boston, and Whitcomb should have credit on his debt for whatever amount the flour brought. If the proceeds of the flour should amount to more than said debt, the balance was to be paid back to Whitcomb; and if the proceeds were less than the debt, then Whitcomb should pay the bank the deficit. The ap-

¹ For a discussion of the right of stoppage *in transitu*, see The E. H. Pray, *post*, 474, and note, 476.

plication of the proceeds of the flour did result in a deficit which is still due and owing from Whitcomb to the bank. Afterwards, and before the flour arrived in Boston, plaintiff, being informed of the insolvency of Whitcomb, notified defendant not to deliver the flour to Whitcomb or his assigns. On the arrival of the flour in Boston the National Bank of Redemption claimed to be the owner, and entitled to the possession thereof, and demanded it from the defendant, and thereupon defendant delivered said flour to the said bank. The plaintiff brings suit against the defendant for conversion of the flour. The defendant demurs to the complaint.

Emerson Hadley, for the demurrer.

Bigelow, Flandrau & Squires, contra.

NELSON, J. The above facts are undisputed, and the questions presented for determination are clearly raised by the demurrer to the complaint. I think they are settled by the United States supreme court. Expressions of opinion are found in some state tribunals adverse to the propositions announced by the supreme court, but the opinion of the latter is supported by an exhaustive review of the principles of commercial law involved, and a logical conclusion is reached.

As applicable to the facts in the case at bar, discussed by that court, the first point is whether the bill of lading, deliverable to the order of plaintiff, (the shipper,) and attached to the draft drawn upon Whitcomb, and sent to the Tremont Bank "for acceptance and collection," with no other instruction, was rightfully delivered on acceptance thereof, and passed the title to the flour, or whether the bank must hold the bill of lading until payment of the draft before it could pass title by its delivery. *National Bank v. Merchants' Bank*, 91 U. S. 92, settles this question, and a reference to this authority is all that is necessary. Whitcomb, on acceptance of the draft, was entitled to the bill of lading, and the title to the flour passed, so that, on transferring it to the National Bank of Redemption for an antecedent debt, under an agreement that the bank should sell the flour on its arrival in Boston, and credit him on the debt, he lost control of the flour. When the plaintiff, on discovery of Whitcomb's insolvency, notified the defendant not to deliver the flour to him or his assigns, did the right of stoppage *in transitu* exist?

There are no circumstances disclosed to show the bill of lading was not fairly and honestly assigned and transferred by Whitcomb; and, if the antecedent debt is a valuable consideration, the answer to this question must be in the negative. Authorities differ upon this point, and some courts hold that such transfer as security for a pre-existing debt is not for a valuable consideration, and does not defeat the right of stoppage *in transitu*, but the United States supreme court (*Railroad Co. v. National Bank*, 102 U. S. 14) has announced the rule to be that such transfer is not an improper use of commercial securities, and the *bona fide* holder is not affected by equities or defenses

between prior parties of which there was no notice. True, in the case of *Railroad Co. v. National Bank* the transfer was of promissory notes, but the rule extends to all commercial securities, including bills of lading; and the case of *Leask v. Scott*, 2 Q. B. Div. 376, which was a transfer of a bill of lading, is cited with approval by Judge CLIFFORD in his opinion. The transfer and assignment of a bill of lading is equivalent to a delivery of the property described therein.

In this case the bill of lading was delivered to Whitcomb by the Tremont Bank, with intent to put the flour within his reach. The draft was drawn against the flour, and was received by the bank before its arrival. Such symbolical delivery is sufficient to pass title. These instruments are well known to the commercial world. They represent the property described; and in the hands of the holder they are evidence of ownership. *Pollard v. Vinton*, 105 U. S. 8. The delivery, with intent to pass the title to the property, does so, although drawn to order of shipper, and unindorsed, and such assignment absolutely transfers title to the property as would a bill of sale. *McNeil v. Hill*, 1 Woolw. 97.

It is urged that the bill of lading, running to order of the shipper, and delivered to Whitcomb without indorsement, carried on its face notice that he held it subject to equities between prior parties. The Tremont Bank was the agent of plaintiff, and, in the absence of any instructions further than appeared by the indorsement on the draft, had no right to hold the bill of lading after the draft was accepted. It is of no importance that it was delivered unindorsed. It was the intention of the shipper that its agent should deliver the bill of lading on the acceptance of the draft. Such is the legal inference from the facts, and it is not qualified by the additional words "for collection." *National Bank v. Merchants' Bank*, *supra*.

Judgment for defendant.

WHITE v. PULLEY.¹

(Circuit Court, N. D. Alabama. March, 1886.)

1. EXECUTORS AND ADMINISTRATORS—ACTION—PLEADING—ADMINISTRATOR SOLE DISTRIBUTE.

When a person brings a suit as administratrix, alleges that she has fully administered the estate, made her final settlement, and that she is the sole distributee thereof, she is really suing in her own right, and neither as administratrix, assignee, nor distributee.

2. SAME—CONVERSION.

Although the action is named a "plea of trespass on the case," it is immaterial that the facts declared make out an illegal conversion. *Rees v. Coats*, 65 Ala. 256.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

3. SAME—RIGHT TO SUE.

An administrator may sue in his own right for the conversion of goods belonging to the estate, although acquired after the death of the intestate.

4. MORTGAGE—FORECLOSURE SALE—RIGHTS OF PURCHASER—GROWING CROPS.

A mortgage of land does not affect the growing crops until entry under the mortgage, and then all crops not severed pass with the land.¹

5. SAME—MORTGAGE OF CROPS.

A mortgage of the crops made by the mortgagor of the realty, in possession, is a sale of the crops, and in law operates such a severance that they do not pass at a subsequent sale under the mortgage of the realty.

At Law. On demurrer and merits.

The complaint in this case was as follows:

"Elizabeth E. White, the plaintiff, a citizen and a resident of the state of Illinois, by attorney, complains of the defendant, Robt. L. Pulley, a citizen of Alabama, residing in said Northern district, summoned," etc., "of a plea of trespass on the case:

"For that whereas, heretofore, to-wit, on and before the twenty-fourth day of May, A. D. 1879, plaintiff, by appointment in due form of law in the probate court of Madison county, in the state of Alabama, was elected and appointed to be the administratrix of the estate of Michael White, deceased, and at the time aforesaid plaintiff was acting as such administratrix in settling the estate of her said decedent; and plaintiff avers that as such administratrix she, except as herein otherwise appears, fully administered said estate, and, to-wit, on the eighteenth day of April, 1881, made her final settlement of said estate in the probate court of said Madison county; and the plaintiff was and is the sole distributee of her said decedent's estate, which estate was solvent on such settlement.

"And the plaintiff further avers that while she was acting as administratrix of said estate as aforesaid, and at the request of one Robert W. Coltart, she loaned to said Coltart, on, to-wit, on the twenty-fourth day of May, 1879, the sum of fifteen hundred dollars, for which, and as evidence thereof, the said Coltart made his bond or writing obligatory of date as last aforesaid, for said sum of fifteen hundred dollars; and to secure the payment of said sum of fifteen hundred dollars the said R. W. Coltart, on said twenty-fourth day of May aforesaid, made and executed his certain mortgage, whereby the said Coltart, among other things, did give, grant, bargain, sell, and convey to plaintiff his entire crop of corn and cotton to be grown by the said Coltart on his plantation situated in the Big Cane, in said county and state, upon the conditions in said mortgage set out; the said crop of corn and cotton then having been planted, and being then in process of cultivation, by said Coltart, on his said plantation.

"And plaintiff further avers that the crop so grown for said year 1879 amounted to twenty-seven bales of cotton, of great value, to-wit, of the value of fifteen hundred dollars; and the corn so grown on the said plantation for said year amounted to twelve hundred bushels, of the value, to-wit, of the value of six hundred dollars; and that all of said corn and cotton so grown as aforesaid was embraced in and covered by said mortgage.

"And plaintiff further avers that on, to-wit, on or about the eleventh day of October, A. D. 1879, the said Robert L. Pulley, the defendant, entered upon the plantation aforesaid on which said crop of corn and cotton then was, and took and carried away all and entire the said twenty-seven bales of cotton, and the said twelve hundred bushels of corn, and converted the same to his own use; and by such taking and carrying away and conversion as aforesaid by the said defendant, the security for the payment of the debt due

¹See note at end of case.

from the said Coltart to plaintiff was taken away, destroyed, and rendered of no avail as a security to plaintiff for her said debt so due her from the said Coltart; and the said debt so due as aforesaid, together with the interest thereon, is yet due and unpaid, except that the same is entitled to a credit of five hundred and eighty-seven (\$587) dollars paid thereon on the thirteenth day of December, 1879.

"And plaintiff further avers that the said Coltart departed this life on, to-wit, on the fifth day of September, 1879, leaving no property, estate, or effects liable to the payment of plaintiff's debts now due as aforesaid, nor out of which the same could be made; and plaintiff is the owner of said debt and mortgage aforesaid, and is entitled to the proceeds thereof.

"Whereby, and by reason of the premises, a right of action hath accrued to the plaintiff to have and recover of the defendant two thousand dollars (\$2,000) as damages; hence this suit."

To this declaration the defendant demurred as follows:

"(1) That said declaration does not show in what manner the said plaintiff acquired her title to the said mortgage and debt; (2) that said plaintiff did not, at the time of the alleged taking of said crop of corn and cotton, have such title thereto, or interest therein, or in and to the indebtedness secured by said mortgage, as entitles her in law to maintain this action; (3) that said action is of tort, and cannot be maintained by the plaintiff, whose declaration shows that the right of action accrued to her as administratrix, and not in her individual character; (4) that said declaration shows that no damage in law has been done said plaintiff for which this action can be maintained; (5) that the property alleged in said declaration to have been taken and carried away by the defendant, and by him converted to his own use, is by said declaration alleged to have been the property of the plaintiff as administratrix of the estate of Michael White, deceased, and not the property of the plaintiff in her individual capacity; wherefore plaintiff, in her individual capacity, has no action against defendant for any trespass upon or wrong to said property of said administratrix of said Michael White, deceased; (6) that plaintiff, as sole distributee of the estate of Michael White, deceased, cannot maintain any action for the alleged wrong or trespass against the plaintiff as administratrix of the estate of said Michael White, deceased; (7) that said declaration contains no averment that any judgment or decree of a court of competent jurisdiction has been rendered vesting in the plaintiff, as sole distributee of said Michael White's estate, the right of action upon the tort alleged in said declaration; (8) that the plaintiff cannot sue in this court on the trespass or tort alleged in the declaration for the reason that it is not, alleged in said declaration that at the time said tort or trespass is alleged to have been committed said administratrix, or said plaintiff, was a non-resident of the state of Alabama; (9) that the plaintiff, as sole distributee of the estate of Michael White, deceased, hath complained against said defendant as in a plea of trespass on the case for alleged wrongs, or trespasses, against the administratrix of said Michael White's estate, whereas, the declaration ought to have been in a plea of trover for the value of the property alleged to have been taken and converted by the defendant."

Without waiving the demurrer the parties waive trial by jury, and submit the case to the court on the demurrer and the merits; the defendants pleading the general issue, and setting up title under prior mortgages, in case the demurrer is overruled. The plaintiff proves the case substantially as made in the declaration. The defendant proves (1) a mortgage by plaintiff's grantor, Coltart, of land to a Mrs.

Hamilton, of date April 24, 1878, law-day January 1, 1879; (2) deed by Mrs. Hamilton to defendant, Pulley, under sale of the mortgaged land, October 11, 1879, deed dated October 15, 1879; (3) mortgage by Coltart and wife, September 18, 1876, to Pulley, defendant, of land to secure debt of \$2,300, law-day September 18, 1877; (4) proof that land embraced in said deeds and mortgages is the same as that upon which the crops claimed by plaintiff were grown; that Pulley entered into possession of the land on which the crops were grown under his mortgage of September 18, 1876, immediately on the death of Coltart, about the middle of September, 1879, while the crops claimed by plaintiff were standing ungathered; that Pulley gathered the crops while holding the land under his own mortgage, and as purchaser under the sale under Mrs. Hamilton's mortgage; and at the time of entering had no knowledge of Mrs. White's claim, but learned of it soon after.

L. W. Day and Humes, Gordon & Sheffey, for plaintiff.

R. C. Brickell and Cabaniss & Ward, for defendant.

PARDEE, J. The question raised by the demurrer as to the plaintiff's right to maintain this action has been one of difficulty, because the declaration contains the unnecessary statements that plaintiff, as administratrix of the estate of Michael White, has, except as otherwise appears, filed her final account of administration, and that plaintiff is the sole distributee of the said estate. The learned counsel for defendant have plausibly assumed that plaintiff was suing in the capacity of distributee for an alleged conversion suffered in her capacity as administratrix, and have contended that the suit must fall because the right of action for a tort is not assignable, and because the distributees of an estate can only enforce their rights through an administration.

Upon the examination I have given the matter, I am inclined to the opinion that their contention is well founded, if the plaintiff is suing as assignee or distributee; but I have concluded that the plaintiff is suing in her own right, and neither as administratrix, assignee, nor distributee. I am inclined to think that the unnecessary averments referred to were inserted by the counsel for plaintiff to support some theory of the case not yet developed. That the action is named a "plea of trespass on the case," while the facts declared make out an illegal conversion, is immaterial, and the authorities cited as to the necessity of the right of possession in order to maintain an action of trespass are therefore irrelevant.

In the case of *Rees v. Coats*, 65 Ala. 256, it is decided that "a person who has a valid lien under a verbal mortgage, on a crop which was not planted when the mortgage was given, may maintain a special action on the case against another who, with notice of such lien, has converted the crop when gathered to his own use." See, also, *Columbus Iron-works v. Renfro*, 71 Ala. 579. These authorities are

sufficient to support the plaintiff's action, so far as the form or style of it is concerned.

As to the right of the plaintiff to sue in her own name for a tort against property of the estate, I find in *Williams on Executors* the following declared:

"Upon the death of the testator or intestate, if any injury is afterwards done to his goods and chattels, the executor or administrator may bring an action for damages for tort; and under such circumstances he has his option either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character. So with respect to the action of trover, if the goods are taken and converted after his death, and before the executor has obtained possession of them, he may either bring an action in his own name without alleging himself executor, or he may sue as executor, and declare either that the testator was possessed of the goods, and the defendant, after his death, converted them, or he may allege that he himself was possessed as executor, and the defendant converted them." See *Williams, Ex'rs*, 784.

"Where the action accrues to the executor or administrator upon a contract made by or with him as such, after the death of the testator or intestate, or for an injury done to, or conversion of, the property of the testator or intestate, in the hands or possession of the executor or administrator, after the death of the intestate or testator, the action may and ought to be brought in the proper name of the executor or administrator, but not as such." *Id.* 785, note, and authorities there cited.

It follows that an administrator may sue in his own right for the conversion of goods belonging to the estate, although acquired after the death of the intestate. In the present case it may be noticed, too, as bearing on the right of plaintiff to sue individually, that the declaration does not show that the money loaned Coltart was the money of the estate, nor that the bond and mortgage given by Coltart were given to the plaintiff as administratrix. The demurrer should be overruled.

On the merits, the question is whether the mortgage given by Coltart to plaintiff operated a severance of the growing crops mortgaged from the realty. I think it clear that a mortgage of land does not affect the growing crops until entry under the mortgage, and then all crops not severed pass with the land. See 2 *Jones, Mortg.* § 1658, and cases cited; and *Coffey v. Hunt*, 75 Ala. 236. The crop in this case alleged to have been converted was not physically severed at the time defendant entered under his mortgage, nor entirely gathered when defendant purchased at the sale under Mrs. Hamilton's mortgage.

But the plaintiff contends that Coltart had the right to sell the growing crops at the time he gave plaintiff a mortgage on them, and that giving the mortgage operated a legal severance of the crops. The mortgagee may, if he sees fit, enter at any time after default; but if he chooses to leave the mortgagor in possession he consents that the profits may be received by the mortgagor, and held without account. See *Hil. Mortg.* 187. The rights of the mortgagor in the mortgaged

premises are well settled. He is regarded as the owner of the property as against all the world except the mortgagee. "He has the power of conveying or leasing the premises subject to the incumbrance, and is entitled to the rents and profits until they are intercepted by some active assertion of claim to them by the mortgagee." *Comer v. Sheehan*, 74 Ala. 452; *Falkner v. Campbell*, Id. 359; *Johnston v. Riddle*, 70 Ala. 219. Even though the mortgage may, in terms, give a lien upon the profits and income until possession of the mortgaged premises is taken, or something equivalent done, they belong to the mortgagor. See *Johnston v. Riddle*, *supra*; *Fosdick v. Schall*, 99 U. S. 253. "A mortgagor of real estate is not liable for rent while in possession. He contracts to pay interest, not rent." *Gilman v. Telegraph Co.*, 91 U. S. 616, 617. A mortgagor is entitled to sever, in law or in fact, the crops which stand upon his land at any time prior to the destruction of his title by sale or entry under the mortgage. This results from his ownership, and consequent right to the use and profit of this land." *Willis v. Moore*, 59 Tex. 628. See *Bittinger v. Baker*, 29 Pa. St. 70; *Buckout v. Swift*, 27 Cal. 433; *Freem. Ex'ns*, § 113. In *Myers v. White*, 1 Rawle, 353, it was decided that, even after the commencement of a suit on a mortgage, the mortgagor may dispose of his growing crop, and then it will not pass to the sheriff's vendee though it be still growing on the land, and this decision is indorsed as correct law in 90 Pa. St. 217. In *Willis v. Moore* the decision quoted is put upon the ground that a mortgage in Texas is a mere security for debt, and in *Bittinger v. Baker* the opinion of the court is based, in part, on the law of Pennsylvania as to mortgages being liens on land, and not titles to it. In this last case, however, the court, after a review of the Pennsylvania and common-law authorities, says:

"The principle of these cases is that where a person is in possession of land under a title that may be determined by an uncertain event not within his control, it is essential to the interests of agriculture that such a determination of his lease shall not prevent him from reaping what he has sown. Co. Litt. 55; 4 Kent, Comm. 73; 3 Watts, 405. It is a rule demanded by the common sense of the people, and depending on it; and if it does not extend to a case like the one we are considering, then we have revealed to us this strange anomaly of a rule of common law or general custom that is unknown to the people, and that operates as a snare to them when acting on the dictates of common sense."

The only Alabama case to which my attention has been called, and bearing on the point in hand, is to the effect that "a transfer of a rent note after the grant of the reversion is subject to the rule that the rent, as an incident, passes and inures to the owner of the reversion; but if the rent is assigned while the lessor is still the owner of the reversion, and the reversion is afterwards conveyed, the rent and the reversion are effectually severed." *Alabama Gold Life Ins. Co. v. Olivier*, 1 South. Law T. 159. In *Hershey v. Metzgar*, 90 Pa. St. 217, it was held that where, under a claim for exemption, an appraisement

of a growing crop had been made under a previous execution, it operated a severance in law, although under the execution on which the land was sold the debtor could have no exemption of growing crops.

The general rule as to the passing of growing crops with the land is as defendant claims; but under the authorities herein cited, and on principle, I think I should hold in this case that the mortgage of the crops made by Coltart, the mortgagor of the realty in possession, to the plaintiff, was a sale of the crops, and in law operated such a severance that they did not pass at the subsequent sale under the mortgage of the realty.

For the foregoing reasons, and the law and the evidence being in favor of the plaintiff and against the defendant, it is ordered, adjudged, and decreed that the plaintiff, Elizabeth White, do have and recover of the defendant, Robert L. Pulley, the sum of \$913, with legal interest according to the law of Alabama thereon from December 13, 1879, and all costs of suit.

NOTE.

Crops fully matured do not pass by a sheriff's deed upon foreclosure sale of the land. *Everingham v. Braden*, (Iowa,) 12 N. W. Rep. 142.

A mortgagor, and those claiming under him, having the right to the possession and use of the mortgaged property after foreclosure sale until his title is divested by due course of law, may cut and remove all crops growing upon the mortgaged premises, in the usual course of good farming, until the confirmation of the mortgage sale. *Allen v. Elderkin*, (Wis.) 22 N. W. Rep. 842.

After the foreclosure of a mortgage upon a tract of real estate, the mortgagor planted a crop of corn thereon, which was immature and growing when the land was sold pursuant to the decree of foreclosure. One day before the sale of the land the mortgagor sold the corn to another, who claimed the same as against the purchaser of the land. *Held*, that the lien of the mortgage and decree of foreclosure attached to the growing crop as well as to the land, and that the purchaser of the land under the decree would be entitled to the growing and unsevered crop in preference to the vendee of the mortgagor, unless there was a reservation of the crop, or unless the purchaser had waived his right to claim the same. *Beckman v. Sikes*, (Kan.) 10 Pac. Rep. 592.

LAFACI v. KINLER and others.¹

(Circuit Court, E. D. Louisiana. March 26, 1886.)

1. PETITORY ACTION.

In a petitory action, the plaintiff must rely on the strength of his own title, and not upon the weakness of that of his adversary.

2. PRESCRIPTION.

Defendants having shown that they and their authors had been in possession of the real property for a period of more than 30 years, they are protected in the title thus acquired until a better is shown.

At Law.

Ernest T. Florance, for plaintiff.

James D. Augustin, for defendants.

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

BILLINGS, J. The defendants in this case derive title through Baptiste St. Armand, who claims to have purchased in 1830 from the United States, among other lands, section No. 119, in which is included the tract in dispute, and to have obtained a patent therefor on the seventeenth day of September, A. D. 1858. The plaintiff, deriving title through Emile St. Armand, claims that he entered the same tract in 1855, and obtained a patent for it in 1878.

In the view the court takes of the case, it is not necessary to inquire into this apparent conflict of these patents; nor is it necessary to investigate as to whether the land in controversy is within the proper limits of the Paul Loup grant,—since, in 1856, the United States relinquished claim to all lands covered by said grant, reserving all rights of settlers thereon, by whatever title they claimed to hold.

This being a petitory action, the plaintiff must rely upon the strength of his own title, and not upon the weakness of that of his adversaries. The court is of opinion that it has been established that neither the plaintiff, nor any one through whom he claims title, has ever been in possession of these lands in his own right. Their author, Emile St. Armand, with his family, for about two years lived on these lands by permission of Lartigue Mongrue, who was then in possession, and removed from them in 1857, when Mongrue leased it to other tenants. The evidence establishes, also, that the defendants, and the authors of their title, have been in actual possession of the lands in controversy for a period of more than 30 years. They are protected in the title thus acquired until a better is shown. The plaintiffs have failed to show a better title.

Judgment for defendants, with costs.

*In re HIGGINS and others.*¹

(Circuit Court, N. D. Texas. April, 1886.)

1. RAILROAD—RECEIVERS AND THEIR EMPLOYEES.

Receivers are sworn officers of the court, and their agents and employees in operating the railway are, *pro hac vice*, the officers of the court. As such officers, they are responsible to the court for their conduct; and, if they willfully injure the property or endanger it, or seek to cripple its operation in the hands of the receivers, they can and will be made to answer therefor. At the same time, these officers, and the property of the company in the custody of the court, are entitled to and must have the full protection that the court can give, under the laws of the land; and this, whether the grievance comes from within or without.

2. CONTEMPT OF COURT.

It is well settled that whoever unlawfully interferes with property in the possession of a court is guilty of contempt of that court, and it is equally well settled that whoever unlawfully interferes with officers and agents of the court in the full and complete possession and management of property in the cus-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

tody of the court is guilty of a contempt of court, and it is immaterial whether this unlawful interference comes in the way of actual violence, or by intimidation and threats.¹

Proceedings for Contempt.

Charles B. Pearre, U. S. Atty., for the prosecution.

Mr. Priest, for defendants.

PARDEE, J. The Texas & Pacific Railway Company is an insolvent corporation. At the suit of creditors its property, railways, and rolling stock have been taken into the possession of the United States circuit court for the Eastern district of Louisiana, to be held and preserved for the payment of liens as they may be established. In order to hold and preserve the property and the franchises which make the property valuable it is necessary to operate the same, and the court has appointed receivers to operate and manage the several lines of railway forming the Texas & Pacific Railway line, running from New Orleans to El Paso.

The orders of the circuit court for the Eastern district of Louisiana have been entered in proper ancillary proceedings in each district through which the railway lines extend, and have been in each district ratified and confirmed and made the order of the United States circuit court for such district. This railway property is therefore lawfully in the hands of the United States courts in this circuit, and is entitled to and must have the protection of the court. The receivers are sworn officers of the court, and their agents and employes in operating the railway are, *pro hac vice*, the officers of the court. As such officers they are responsible to the court for their conduct, and if they willfully injure the property, or endanger it, or seek to cripple its operation in the hands of the receivers, they can and will be made to answer therefor. At the same time, these officers, and the property of the company in the custody of the court, are entitled to and must have the full protection that the court can give under the laws of the land; and this, whether the grievance comes from within or without. If any employe of the receivers has any grievance or complaint as to his employment or wages or treatment, he can bring the matter before the court, and the court will hear and arbitrate, and see justice done in the premises.

It is well-settled law that whoever unlawfully interferes with property in the possession of a court is guilty of contempt of that court, and I regard it as equally well settled that whoever unlawfully interferes with officers and agents of the court, in the full and complete possession and management of property in the custody of the court, is guilty of a contempt of court; and it is immaterial whether this unlawful interference comes in the way of actual violence, or by in-

¹ Respecting the interference by strikers with property in the hands of the courts, and their liability therefor in criminal contempt, see *In re Doolittle*, 23 Fed. Rep. 544, and note by Francis Wharton, 549-551.

timidation and threats. The employes of the receivers, although, *pro hac vice*, officers of the court, may quit their employment, as can employes of private parties or corporations, provided they do not thereby intentionally disable the property; but they must quit peaceably and decently. Where they combine and conspire to quit with or without notice, with the object and intent of crippling the property or its operation, I have no doubt that they thereby commit a contempt; and all those who combine and conspire with employes to thus quit, or, as officials of labor organizations, issue printed orders to quit, or to strike, with an intent to embarrass the court in administering the property, render themselves liable for contempt of court.

Labor organizations are lawful and generally laudable associations, but they have no legal *status* or authority, and stand before men and the law on no better footing than other social organizations, and it is preposterous that they should attempt to issue orders that free men are bound to obey; and no man can stand in a court of justice and shelter himself behind any such organization from the consequence of his own unlawful acts. It is a part of this case, and has been established by evidence taken under the direction of the court, that among all the employes of the receivers in operating over 1,500 miles of railway there was no complaint made to the receivers, or to the court, by any employe, of bad treatment or insufficient wages or other grievances; and yet orders were issued from a secret organization to all their employes to quit work, to strike, to cripple the operations of a great thoroughfare for travel and commerce; and many employes, confederating and combining, did quit, and induced and forced others to quit, and did hinder and delay the operation of the railway, and did damage the property in the possession of the court many thousand dollars. This action was a gross contempt of court, wholly unreasonable and unjustifiable. The court has learned through the newspapers, and from certain scandalous and anonymous circulars, that these wrongs were committed because the agents of the receivers had discharged as incompetent, and for absence without leave, a certain employe, and refused to reinstate him at the demand of a secret labor organization which claimed that this discharge was in violation of an agreement forced upon the managers of the road prior to the receivership. However this may be, I deem it proper to say that, if true, the reason is impertinent, and such demands cannot be tolerated.

The Texas & Pacific Railway property is in the hands of a recognized constitutional court of the United States, fully able and willing to enforce its lawful authority, and to protect its officers; and that court cannot listen to demands of any secret organization, whether alleged to be social, religious, political, or economical in character. If any employe was improperly discharged by the receivers or their agents, the court was open to hear him, and was willing to see justice done. No such complaint has been made, and I doubt much if such case exists; but the investigation made under

direction of this court, and the development of affairs since the strike was ordered, satisfy me that such alleged reason was a mere scheme and pretense, and that the real motive for the order to strike was to compel a recognition of a certain secret labor organization (which, by evidence, has been shown to be about as arbitrary and autocratic in dealing with labor as the famous six companies of China) as an existing power, so that its officers shall be consulted in the operation and management of railroads in which they do not own any interest, and of which they do not even pretend to be employes; and it is an indisputable fact that nine-tenths of the men obeying the order to strike were not aware of the alleged nor real reason which was at the bottom of the arbitrary order, which was to result in so much injury to them and damage to the public. These present cases show that peaceable trifling with the courts of the land was not sufficiently criminal in the eyes of many of the leaders of these misguided men, and they, with others, have undertaken to order that railway property in the hands of the United States courts should not be operated and managed at all unless with their consent, and upon their terms; and violence and intimidation and bulldozing have been resorted to to prevent the officers of the court from performing their duties. This intolerable conduct goes beyond criminal contempt of court, into the domain of felonious crimes; but, so far as the court has now to deal with it, it is a matter of criminal contempt of court.

It may not be generally known, but the power of the court, under the law, in punishing such cases, is unlimited in imposing fines or imprisonment. The extent of either is a matter wholly within the discretion of the judge. It is unnecessary to say that the court has no desire for mere punishment, and has no other interest in the matter than to vindicate the dignity of the court, protect the property in its charge, and that the judge shall fearlessly and honestly discharge the duties incumbent on him under the constitution and laws of the country. Considering the offenses, the sentences now imposed are light. They are, however, substantial warnings.

Memorandum of orders made and sentences imposed: Timothy Higgins, threatening and cursing employes, 15 days in Dallas jail. Richard Gordon, intimidating employes, and throwing rocks at them, severely injuring one Roberts, 90 days in Dallas jail. Perry Thompson, throwing rocks at cars, plea of guilty and imprisonment considered, discharged. Chas. Wilson, displacing switch and derailing engine, five months in Dallas jail. E. Bishop, Robt. Irwin, F. P. Lowe, F. R. Anderson, William Mace, taking forcible possession of switch and track, resisting officers and threatening employes: Bishop, three months in Dallas jail; F. P. Lowe, sentence postponed for further inquiry until May term, and released on bond of \$1,000 for good behavior and appearance; Robert Irwin, discharged; William Mace and F. R. Anderson, sentence deferred, and released on personal recognizance. Samuel Barry, intimidating employes, etc., discharged. Charles Barton, intimidating and assaulting employes, 30 days in Dallas jail. Ed. Donahue, sentence postponed, released on bond of \$1,000 to appear when notified. In the case of Gordon, Wilson, and Bishop, contempt of the orders of court was aggra-

vated by a criminal endangering of life as well as property, and Gordon and Wilson both exhibited in their conduct an assassin-like disposition and intent. Bishop's conduct, though unlawful, was bold and manly in comparison.

JONES v. UNITED STATES.¹

(Circuit Court, S. D. Georgia. 1886.)

1. POSTAL LAWS—REV. ST. § 5467—INDICTMENT.

In an indictment for stealing under section 5467 of the Revised Statutes, if the thing within the statute be described, no value need be alleged, nor proved if alleged.

2. SAME—DESCRIPTION OF CHECK.

In such an indictment for stealing a check, the check stolen out of a letter need not be set forth *in hæc verba*. A substantive description of the check will suffice, if it is sufficient to inform the accused of what he was charged with stealing, and to protect him from being again put in jeopardy for the same taking.

3. SAME—INDICTMENT IN WORDS OF STATUTE.

The indictment being in the words of the statute, those words must, of themselves, fully, directly, expressly, and without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. *U. S. v. Carll*, 105 U. S. 611.

On Writ of Error to District Court.

W. B. Hill, for plaintiff in error.

S. A. Darnall, U. S. Atty., for defendant in error.

PARDEE, J. The defendant prosecutes a writ of error to reverse a judgment of the district court of this district, convicting him for violation of section 5467 of the Revised Statutes of the United States. The second count of the indictment under which the defendant was convicted, reads as follows:

"And the grand jurors aforesaid, upon our oaths aforesaid, do further present that on the said nineteenth day of July, in the year aforesaid, said Henry Jones, being then and there a person employed in a department of the postal service of the said United States as aforesaid, did, within said division and district, and within the jurisdiction of said court, then and there unlawfully steal, and take out of a certain letter, a certain check, drawn upon the Southern Bank of the State of Georgia, for the sum of \$79.08, payable to the order of J. E. Walker; said check being numbered 1,709, and dated Darien, Ga., July 12, 1884, and the same being signed Robert P. Paul, secretary and treasurer; the said check being of the value of \$79.08, lawful money as aforesaid; and the said check having been then and there inclosed in said certain letter, which said letter had then and there been mailed in the post-office at Temperance, Ga., and directed to S. T. Coleman & Co., Macon, Ga., and which was then and there intended to be conveyed by mail from said post-office at Temperance, Ga., to the post-office at Macon, Ga.; and the said Henry Jones, employed as aforesaid, did then and there steal and take said check described as aforesaid, and which was then and there contained in said letter, out of the

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

same, before said letter had then and there been delivered to the party to whom it was directed as aforesaid, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the said United States."

A demurrer was filed to said indictment as follows:

"The second count in said indictment is not sufficient in law, because it charges this defendant with stealing an article or thing having, as appears from said indictment, no value whatever, to-wit: It charges defendant with stealing a check payable to the order of one J. E. Walker, and which had not been by said Walker indorsed so as to pass the legal title out of him, or so as to be collectible, or of any value to any person whatsoever, and because it does not set forth the ingredients of the offense of larceny or stealing, under the law."

The court overruled the demurrer, and the defendant excepted.

During the trial of said case the district attorney offered in evidence a certain check, a copy of which is as follows:

"\$79.08.

DARIEN, GA., July 12, 1884.

"*Southern Bank of the State of Georgia, of Savannah, Ga.*: Pay to the order of J. E. Walker seventy-nine and eight one-hundredth dollars.

"No. 1709.

ROBERT PAUL, Sec. and Treas."

With the following indorsements thereon:

"J. E. Walker.

"Pay So. Ex. Co., or order, for collection.

"J. N. SMITH."

Defendant's counsel objected to the introduction of the check on the ground of the variance between said check and that described in the indictment, to-wit: That the check mentioned in the indictment was not described as indorsed, whereas the check offered in evidence had been indorsed by said J. E. Walker, so as to pass the legal title out of him, and so as to make the same collectible in the hands of any person into whose possession it came; and because, also, the said check was indorsed by J. N. Smith. All these objections the court overruled, to which ruling the defendant excepted. Other exceptions were taken during the progress of the trial, but they are not insisted upon at this time.

After verdict counsel for defendant filed a motion in arrest of judgment, as follows:

"Now comes the defendant, by his attorneys, being the term at which conviction was had, and, after verdict, and without prejudice to any demurrer now on file in said court, prays the court to set aside the verdict and judgment in said case, and discharge the defendant without day, upon the following grounds, to-wit: *First.* That the indictment in said case is wholly insufficient in law to authorize the court to execute said judgment. *Second.* The second count in said indictment is not sufficient in law, because it charges the defendant with stealing an article or thing having, as appears from said indictment, no value whatever, in that it charges defendant with stealing a check payable to the order of one J. E. Walker, and which had not been by said Walker indorsed so as to pass the legal title out of him, or so as to be collectible, or of any value to any person whatever; and because it does not

set forth the legal ingredients of the offense of larceny or stealing, under the law. *Third.* The bill of indictment is fatally defective in not charging to whom the check or order belonged, or who had the custody or control of the same, and for all that is alleged in said indictment the check may have been the property of and belonged to the defendant. *Fourth.* The said bill of indictment does not set out *in hæc verba* the check or paper charged to have been taken."

The court overruled said motion on each and all the grounds, to which decision overruling the same on each and all the grounds the defendant there and then excepted.

The matters relied on in this court are (1) that the check mentioned in the indictment was a check drawn to order, and not indorsed, and therefore had no value; (2) variance between the check described in the indictment and the one offered on the trial to prove the indictment; (3) that the indictment is insufficient because the offense of larceny is not fully and aptly charged.

1. A reference to the statute shows that "any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money," or "any receipt, acquittance, or discharge of or from any debt," etc., may be the article stolen or taken out of a letter in violation of a statute. As a thing stolen or taken out of a letter in violation of a statute may have no value, it seems clear that in an indictment under the statute, if the thing within the statute be described, no value need be alleged, nor proved if alleged. The draft described in the indictment was an agreement relating to the payment of money, and within the statute.

2. In the indictment there is no attempt to set out the check stolen and taken out of a letter in exact words and figures, but a substantive description of the check, to-wit, of the drawer, drawee, payee, amount, date, and number, is given. The check offered on the trial answers fully to the description in the indictment. A fuller description of the check might, perhaps, have been given by adding the indorsements thereon, if any there were; but it is conceded that it was not necessary to set out the check *in hæc verba*. It seems that a sufficient description was given to identify the check, to inform the accused of what he was charged with stealing and taking, and to protect the accused from being again put in jeopardy for the same taking.

3. The indictment being in the words of the statute, the question is whether those words of themselves fully, directly, and expressly, without uncertainty, or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. See *U. S. v. Carll*, 105 U. S. 611. The offense intended to be punished by the statute is the violation of the sanctity of the mails by one sworn to protect them, and it is to be committed by stealing or taking out of the mail any of the things described in the statute, aiming at an offense similar in character to, and having the ingredients of, the com-

mon-law offense of larceny. True, it is an aggravated larceny, because committed by one in a place of trust, but still it is larceny. To constitute the offense of larceny, according to all definitions, there must be at least a wrongful taking of the property of another, with a felonious intent. Neither of these elements is found in the words of the statute. The thing to be stolen or taken out, so far as the words of the statute go, need not be the property of any one, nor is any intent, wrongful, fraudulent, felonious, or otherwise, referred to in the statute, unless it is to be found in the word "steal." The words of the statute, therefore, do not specifically set forth all the elements necessary to constitute the offense intended to be punished, and therefore an indictment which merely follows the words of the statute is insufficient. See *U. S. v. Carll*, *supra*, and cases there cited. In the present case, as the indictment does not lay the thing alleged to have been stolen as the property of any one, nor allege any wrongful intent, it is not good and sufficient.

From this it follows that the judgment of the district court was erroneous, and should be reversed, and a judgment to that effect will be entered.

GLOBE NAIL CO. v. SUPERIOR NAIL CO. and others.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS.

In view of the state of the prior art as disclosed by older patents, and of the patentee's acceptance of restricted claims after the rejection of broad ones, patent No. 92,355, of July 16, 1869, to T. H. Fuller, assignee of A. M. Polsey, for an improved manufacture of horse-nails, must be strictly construed, and confined to the making of nails by punching or cutting from hot-rolled ribbed bars of metal a headed blank, and the subsequent cold rolling, as an entire process.

2. SAME.

This patent cannot be made to cover the process of the older art of hot rolling the blanks from rods, and finishing the nails by cold rolling.

3. SAME.

This patent may possibly be sustained when limited to the special process of producing blanks from a ribbed strip of metal, and finishing them by cold rolling.

4. SAME—INFRINGEMENT.

This patent as thus construed not infringed by defendant's method, which consisted in forging blanks from hot rods, slightly rolling them while cold to straighten and smooth them, and then shearing them to give the shank the required taper.

5. SAME—APPLICATION—WHAT CONSIDERED DATE OF, WHEN SUBSTITUTED SPECIFICATION IS FILED.

Where, in an application for a patent, a substituted specification was filed, which was so different from the original as to cover a different invention, *held*, that the application must be considered as filed as of the date of such substituted specification.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

6. SAME—FOREIGN PATENT.

For the purpose of determining whether the term of a United States patent was limited by a foreign patent for the same invention, it was *held* that the date of an amendment which substituted, for the invention described in the original application, the invention covered by the patent as granted, must be taken as the date of filing the application.

Bill for injunction and accounting under letters patent No. 92,355, granted to T. H. Fuller, assignee of A. M. Polsey, July 16, 1869, for an "Improved Manufacture of Nails." The patent describes the manner of making horseshoe-nails by first rolling from the end of a bar while hot a strip so as to form a rib or raised portion at one end, and the remainder of which was made thinner, and from the sides or edges of this ribbed strip the blanks for the nails were to be cut or punched off, whereby the rib or the strip formed the head, and the thinner portion the shank of the nail, which was to be finished by cold rolling the shanks. Defendants made horse-nails by forging their blanks upon the end of a hot rod or strip of metal, the form and length being given by rolling and swaging. The nails were then passed through a machine whereby they were slightly compressed or cold rolled, and were finished by means of shearing dies. The original application for this patent was filed August 27, 1866, and the claim was for "a nail having a cut head and drawn point, as a new article of manufacture." This application was rejected in November, 1866, and laid dormant until June 23, 1869, when it was amended by striking out all but the signature of the inventor, and by inserting the present specification and claims, upon which the patent was granted July 16, 1869. The specification and claim originally filed differed materially from the specification and claims on which the patent was granted. On the communication of Polsey, the inventor, an English patent was obtained in December, 1866, for the same invention covered by the United States patent. Defendants contended that Polsey's amendment of June 23, 1869, presented a different invention from that specified in his application filed August 27, 1866, and that, therefore, in considering the question as to the effect of the English patent upon the United States patent, the application for the latter must be taken as filed June 23, 1869. The other defenses were that the patent was void for want of novelty, and that defendants did not infringe.

Thomas H. Pease, George L. Roberts, and William M. Richardson,
for complainant.

Offield, Towle & Phelps, for defendants.

BLODGETT, J. This is a suit for an injunction and accounting by reason of the alleged infringement of letters patent No. 92,355, granted to T. H. Fuller, assignee of A. M. Polsey, on the sixteenth day of July, 1869, for "An Improved Manufacture of Nails."

In the specifications of the patent the inventor says:

"This invention consists in a metallic nail, as a new article of manufacture, in which the head is left in that condition of softness produced by hot-working a plate or strip of metal, and in that condition of form which results from the combined operation of hot working or rolling said plate and of punching or cutting a blank therefrom, while the shank is left in that condition of hardness, smoothness, and freedom from scale and rigidity which is produced by rolling the cut shank, substantially throughout, while cold, from the junction of the shank with the head to the point; such nails being superior for use with the shoes and hoofs of animals to any others ever before produced, in that the whole shank or body of the nail is hardened in a constantly increasing ratio from the head to the point; the rigidity of the nail, however, remaining nearly uniform throughout the shank, because the cross-section of the nail beyond the head is diminished in area about as the hardness and density of the metal are increased by cold rolling."

The mode of manufacture by which the nails covered by this patent are to be produced is to, first, roll from the end of a bar while hot a strip so as to form a rib or raised portion at one end, and the remainder of which is made much thinner, and from the sides or edges of this ribbed strip the blanks for the nails are to be cut or punched off, whereby the rib of the strip forms the head, and the thinner portion forms the shank, of the nail, and then to finish the nail by cold rolling the shank.

The claim of the patent is:

"A nail made by punching or cutting from hot-rolled ribbed bars of metal a headed blank, substantially as described, and by elongating, hardening, and compressing the shanks of such blank by cold rolling from the head to the point, thereby giving to all parts of the nail so produced the superior qualities specified."

The defenses are (1) that this patent had expired at the time this suit was commenced by reason of the expiration of an English patent granted December 18, 1866, to Robert Lake, on a communication from Polsey, the inventor of the patent in suit, whereby equity had no jurisdiction of the controversy; (2) that the patent is void for want of novelty; (3) that defendants do not infringe.

With the view I take of the construction which must be given this patent, I shall only consider the question of infringement. The defendants make horse-nails by forging their blanks upon the end of a hot rod or strip of metal about the size of the head of a horse-nail. The head of the nail, and the general form and length of the shank, are shaped from the hot rod by means of rollers and swages, the shank being drawn down substantially to its required length and thickness. It is then passed through a machine where one side of the shank is held against a smooth surface, while a roller presses the other side, whereby the metal is somewhat compressed while cold, and the required curvature given to the shank, and the end pressed so as to form a bevel. It is then carried to the shearing die, where the surplus iron upon the edges is cut away or sheared off, so as to give the shank the required taper. It was conceded upon the trial that the defendant's method of producing its blank is substantially like that

described by the Dodge patents of 1859, which have all expired; and it can only be contended that the defendants infringe the complainant's patent by the comparatively slight cold rolling they give the shanks of their nails in the finishing-machine. The claim of the patent is for a nail made by punching or cutting the headed blank from a hot-rolled ribbed bar, and *elongating*, hardening, and compressing the shank by cold rolling from head to point. The Fowler patent of June 5, 1866, issued a month before Polsey filed any application for the patent now in question, showed a process of forming blanks for horseshoe-nails by hot rolling from rods, and finishing and pointing them by cold rolling. The Whipple patent of 1864 also shows the production of horseshoe-nails by pressure from swages and dies when hot, and finishing the shank by cold rolling. The Dodge machine used by the defendants provides for the production of blanks for horseshoe-nails by rollers and swages from hot rods, which were afterwards finished by hammering or rolling while cold. The proof shows that in his first application for this patent Polsey claimed broadly a nail with a cut head and a rolled shank. This application was rejected, and after more than two years' delay he was allowed to file a new specification, and take the patent with its present claim.

With this condition of the art shown by the proof at the time of the Polsey invention, and his own act accepting a much narrower claim than that first applied for, I can have no doubt that the claim of this patent must be strictly construed, and confined to the making of nails by punching or cutting from hot-rolled ribbed bars of metal a headed blank, and the subsequent cold rolling, as an entire process; and the claim cannot be extended so as to include the process of the older art of hot rolling the blanks from rods, and finishing by cold rolling. The process of nail making, as shown by the patent, consisted in slicing off, so to speak, from the side of a ribbed bar of metal the nail blanks, so that the blanks would contain the head fully shaped by hot rolling and cutting, and the shank partly drawn out by hot rolling, and finishing the shank by drawing it out or "*elongating*" it by cold rolling. As a special process for producing blanks by thus slicing or punching them from a ribbed strip of metal, the patent may possibly be sustained under the then condition of the art shown by the proof; but it certainly cannot be construed to cover the older method of rolling blanks from hot rods, and subsequently finishing them by cold rolling or cold hammering, as shown in the Whipple, Fowler, Dodge, and several other machines exhibited in the proofs. The cold rolling which the defendants do upon the shanks of their nails in finishing them is very slight, and only intended to straighten and smooth them, and does not, as the proof shows, elongate them, and is not intended to do so. I am therefore clearly of opinion that, with the strict construction which must be given to this patent, the defendants do not infringe.

In the case of *Globe Nail Co. v. United States Horse-nail Co.*,

19 Fed. Rep. 819, heard before the learned judge of the district of Massachusetts, the record of which has been put into this case, the validity of this patent is sustained; but the defendants in that case cut their blanks from a ribbed strip of metal substantially as called for by the patent, and therefore the infringement was clearly established, and that case has no special bearing upon the questions involved in this.

The proof shows that the original application was made by Polsey in July, 1866, with a broad claim for a "nail having a cut head and drawn point, as a new article of manufacture," and not limiting the process of manufacture to cold rolling the shank of the nail, but allowing it to be hot rolled, swaged, or hammered, although the applicant expressed a preference for the cold rolling of the shank. This application was rejected in November, 1866, and laid dormant in the patent-office until June, 1869, when the specification was amended by striking out all but the signature, and inserting the specification of the patent as it now stands. The specifications of the present patent are so different from the original as to make what seems to me to be a new and different patent from that described in the original application, and therefore, for all the purposes of this patent, the application must be considered as filed June 23, 1869. In December, 1866, the English patent to Lake, on the communication of Polsey, was obtained, and, as the life of this English patent limits the life of the American patent to 17 years from the date of the English patent, I think the life of this patent is limited to 17 years from December, 1866; by which rule this patent had expired before this suit was commenced, and therefore there was no jurisdiction in equity, even if the defendants had infringed it during its life-time.

This bill is therefore dismissed for want of equity.

GLOBE NAIL Co. v. SUPERIOR NAIL Co.¹

(Circuit Court, N. D. Illinois. March 23, 1886.)

PATENTS FOR INVENTIONS—ADMISSIONS IN ANSWER.

In a suit for infringement of reissued letters patent No. 5,207, granted December 31, 1872, to the complainant, as assignee of S. E. Chase, for an improvement in finishing horseshoe-nails, the answer said that the defendant had "never felt disposed to contest said matter with the complainant, but chose rather to make such terms as were by said complainant made with the other companies, and pay for its royalty, rather than to have litigation, and proposes to do the same now, and has so offered to do with said complainant both before and after this suit was commenced." *Held*, that with this admission in the defendant's answer there could be but one decree, and that in favor of complainant, sustaining the validity of the patent and finding infringement.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

In Equity.

Thomas H. Pease and Morse & Stone, for complainant.

Offield & Towle, for defendant.

BLODGETT, J. This suit is brought for an injunction and accounting by reason of the alleged infringement of reissued letters patent No. 5,207, granted December 31, 1872, to the Globe Nail Company, assignee of S. E. Chase, for an "Improvement in Finishing Horse-shoe-nails," the original patent having been granted June 9, 1868. The patent covers a device for forming the point of horseshoe-nails by first beveling the point of the blank by rolling or pressing, and then shearing away the superfluous metal from the edges or sides of the blank, so as to give the nail the required taper upon its sides, this shearing being done by a V-shaped cutting die, into which the nail is forced.

The claim of the patent is:

"(1) In finishing nails for animals' shoes, the process of beveling the small end of each by spreading the metal by pressure, and then removing the superfluous metal by cutting or shearing, substantially as and for the purpose specified. (2) The process of curving the bodies of nails and beveling their points by spreading the metal laterally, and afterwards forcing them through an open die to shear off the superfluous metal, substantially as and for the purpose specified."

The process used by the defendant, as shown by the proof, is: They form a blank by a hot-rolling process from a rod. This blank is then taken to a finishing machine, where the nail receives a slight rolling, commencing near the head and gradually compressing it towards the point, making the point hard, and, at the same time, forming upon the point of the blank a bevel by pressure. The nail is then held against a punch, and a V-shaped die advances and shears away the superfluous metal upon the edges of the blank so as to point the nail and give it the requisite taper. There can be no doubt, I think, that this process is substantially the process covered by the patent, and the defendants do not deny their infringement, nor do they deny the validity of the patent. The defendant in its answer says it "has never felt disposed to contest said matter with the complainant, but chose rather to make such terms as were by said complainant made with the other companies, and pay for its royalty, rather than to have litigation, and proposes to do the same now, and has so offered to do with said complainant both before and after this suit was commenced."

With this admission in the defendant's answer there can be but one decree, and that is in favor of complainant, sustaining the validity of the patent and finding infringement.

MULLER v. ELLISON and others.¹

(*Circuit Court, S. D. New York. May 6, 1886.*)

1. PATENTS FOR INVENTIONS—CHAINS FOR BRACELETS, ETC.

Letters patent No. 287,564, of October 30, 1883, to Carl A. Muller, for an improvement in chains for bracelets and articles of jewelry, are void for want of patentable novelty.

2. SAME.

An ornamental chain, composed of transverse helices interwoven together, in the usual way, with the ends of the wires bent inwardly, so as to interlock, does not present a patentable invention; as the idea of bending in rather than of soldering the ends or of closing the ends of the spirals was an idea which would naturally suggest itself to the worker in wire, and the bending was the ordinary work of the skilled artisan.

In Equity.

Henry C. Andrews, for plaintiff.

E. R. Mead, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the infringement of letters patent No. 287,564, issued October 30, 1883, to the complainant for an improvement in chains for bracelets and articles of jewelry. The defendants took no proofs, and did not appear at the hearing. The specification of the patent says that—

"Chains have been made of wire helices intertwined or threaded together, and provided with end plates or caps, to which the ends of the wires are fastened. Chains made in this manner are expensive, in consequence of the cost of soldering, and with rolled plate the end pieces are more expensive than the wire, because it is more difficult to make such end plates with the entire surface of gold. In my improved chain the ends of the wire forming the helices are bent inwardly, and interlocked in such a manner as to prevent the helices untwisting or separating, and at the same time to form an ornamental edge along the flat chain. * * * I am aware that wire helices have been screwed or interwoven together to form chains, armor, bed bottoms, and other articles, and that the end coils of the helices have been closed, to prevent one helix unscrewing from the next. This is not adapted to chains for bracelets, because the edges of the chain cannot be made uniform in appearance, and the ends of the wire kept within the edge, so as to avoid roughness. By bending the ends of the wires inwardly, as described, ranges of edge loops are formed, and the ends of the wires are entirely within the chain."

The claim is as follows:

"The ornamental chain, composed of transverse helices interwoven together, with the ends of the wires bent inwardly, so as to interlock, substantially as set forth."

The improved method of manufacture commences after the spirals have been wound and interwoven together in the customary way. The first step is to clip the ends of the spirals evenly, by one trans-

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

verse cut, by a pair of shears. Then the end of each spiral is cut by a pair of cutting pliers, to bring the ends in the right shape for bending in. All the ends of the spirals are then bent. The edge is finished by pressing or flattening. The entire invention consists in bending inward the ends of the spiral. In this there is no inventive genius. The idea of bending in, rather than of soldering, the ends, or of closing the ends of the spirals, was an idea which would naturally suggest itself to the worker in wire, and did not partake of invention, and the steps by which the bending was accomplished were the ordinary work of the skilled artisan. *Pearce v. Mulford*, 102 U. S. 112; *Hollister v. Benedict Manuf'g Co.*, 113 U. S. 59; S. C. 5 Sup. Ct. Rep. 717.

The bill is dismissed.

FRAM and another v. SHARON VALLEY MALLEABLE & GRAY IRON Co.
and others.¹

(Circuit Court D. Connecticut. May 14, 1886.)

PATENTS FOR INVENTIONS—SCANDINAVIAN PADLOCKS.

Motion for preliminary injunction to restrain the alleged violation of reissued letters patent No. 10,272, of January 16, 1883, to Fram & Fram, Scandinavian padlock, denied; the question of infringement of the first two claims not being clear, and there being much doubt whether the third claim can be sustained in its present form.

In Equity.

Joseph C. Fraley, for plaintiff.

Charles E. Mitchell, for defendant.

SHIPMAN, J. This is a motion for a preliminary injunction against the infringement of reissued letters patent No. 10,272, applied for June 28, 1882, and issued January 16, 1883, to the complainants, for an improvement in Scandinavian padlocks. The original patent was dated April 26, 1881. The objects of the improvements were—"First, to steady the upper end of the key in the case while turning tumblers; and, second, to prevent the shifting of the tumblers from their places on the stationary plates."

The inventor said, in explanation of the first part of his invention, in his affidavit in the present case, as follows:

"In the old style of lock it was not practicable to cast the seat or bearing for the end of the key in the shell itself, and the seat consequently had to be drilled in the shell of the lock at the bottom of a deep cavity which rendered it difficult to strike the center, and support the drill properly while at work. Thus many shells were spoiled, and even when the drilling was successful

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

the cost of labor was considerable. To meet this, I devised the removable top plate, which forms the subject of the first and second claims of the patent, and which can readily be cast in its complete form, requires no drilling, and must always drop accurately into position."

The improvement consisted in a stationary plate next to the inner top surface of the case, having a circular opening to receive the end of the key; one face of the plate being flat, and the other concave. The concave side is toward the top of the case, and thus the end of the key has a bearing in the plate instead of in the case.

The single claim of the original patent was as follows:

"The plate, R, with a circular opening, *a*, in the center, and having one face flat, and the other concave, in combination with the case, A, having ribs, I, and the end, *m*, of the key, for the purpose of receiving and holding the key in place."

The three claims of the reissue are as follows:

"(1) The top plate, forming the upper tumbler bearing, and provided with an opening arranged to form a bearing for the end of the key, substantially as and for the purpose set forth.

"(2) A plate removably secured in the upper portion of the lock-case, and provided with a central opening for the reception of the end of the key for the purpose of steadying the same; the lower face of the said plate being smooth, so as to form a bearing surface for the tumbler situated below the same, while the upper face thereof is adapted to have a limited bearing against the inner top of the case, for the purpose set forth.

"(3) The combination, with the case and the series of removable plates secured in a stationary manner within the case,—said stationary plates being provided with key-holes, and curved guides or flanges encircling the key-holes,—of the rotary tumblers provided with key-holes adapted to be turned to register with those in the stationary plates, and constructed to fit within the curved guides or flanges on the latter, the staple, and a removable key, substantially as set forth."

The top plate of the defendants' lock has a central opening for the end of the key and is flat upon both sides. The top of the shell is provided with a raised arm, which keeps the center of the plate sufficiently far off from the shell to allow the end of the key to go freely through the hole.

In the plaintiffs' lock the concavity is in the plate, while in the defendant's lock the concavity is cast upon the inside of the shell. The peculiarity of the complainants' lock, so far as the first two claims are concerned, is the concavity which enables the end of the key to have a bearing for flat plates, with holes for the reception of the key, existed in the Romer patent of 1879. The complainants insist that it is immaterial whether the plate is raised above the surface of the shell by means of its own concave face, or by means of a concavity which is caused by an arm or a ring cast upon the inside of the shell. The defendants contend that, in view of the narrow character of the invention and of the original patent, the first and second claims of the reissue are to be construed to be for a concave plate in which the concavity is caused by the manner in which the plate is constructed, and cannot be for a plate so raised, by any means, above the surface

of the shell that the key shall have a bearing in the hole in the plate.

The defendants have no point of sufficient importance to compel a denial of the motion for an injunction, so far as the first two claims are concerned. The claim in the original application, which corresponded with the third claim of the reissue, was erased and was abandoned by the patentee, upon objection thereto by the patent office. There is therefore so much doubt whether the third claim can be sustained in its present form that no injunction should be issued against its infringement.

The complainants rely upon a decision of the circuit court for the Eastern district of Pennsylvania, in which the reissued patent was sustained; but in that case the validity of the reissue, as a reissue, was not denied, and the infringing device was a copy of the complainants' lock. The two important questions in this case were not involved in the Pennsylvania case.

The motion is denied.

MASON v. ERVINE and others.¹

(Circuit Court, E. D. Louisiana. March 6, 1886.)

1. PILOTS—BRANCH PILOTS OF THE PORT OF NEW ORLEANS.

The Association of Branch Pilots of the port of New Orleans does not constitute what is known in Louisiana as a commercial partnership, in which the partners are liable to their creditors *in solido*.

2. SAME.

Said association is not an insurer of the experience, skill, judgment, or conduct of any of its members, and therefore, when without fault itself, it is not liable for the negligence, want of skill, or fault of any Branch Pilot, belonging to the association, resulting in damage to any vessel that such pilot may undertake to pilot into the Mississippi river from the sea.

3. SAME.

When a pilot, in piloting a vessel, has used his best skill and judgment, he is not liable for her loss, although the result shows that his best judgment was wrong.

Admiralty Appeal.

O. B. Sansum, for libellant and appellant.

I. R. Beckwith, for defendants and appellees.

PARDEE, J. This cause came on to be heard and was argued, and thereupon the court does find as the facts in the case as follows:

(1) That the steam pilot-boat Underwriter was, on the nineteenth October, 1883, owned by John Ervine and other defendants named in the libel, with the exception of John Westerfield; that under the provisions of section 2707 of the Revised Statutes of the State of Louisi-

¹ Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

ana the Branch Pilots of the Port of New Orleans were associated in one voluntary association, as authorized by said section, and as set forth in the articles of association, a copy of which is attached to the libel in the cause, marked "Exhibit A" and made part of these findings; that the owners of the steam pilot-boat Underwriter named in the libel, while members of the association did not constitute the entire Association of Branch Pilots of the Port of New Orleans, there being Associated Branch Pilots not named in the libel, and who were not owners in the Underwriter; that the Association of Branch Pilots of the Port of New Orleans, Louisiana, as disclosed in the documents and proofs in the record is not a commercial firm under the laws of the state of Louisiana, and was not on the nineteenth October, 1883, or when this suit was brought.

(2) That on the nineteenth day of October, 1883, the brig Helen H. Monroe, bound on a voyage from Philadelphia to the port of New Orleans, laden with a cargo of coals, reached the offing at the mouth of the Mississippi river, and signaled for a pilot; that the Helen H. Monroe was of about 453.55 tons burden, and in rig a hermaphrodite brig; that she was heavily laden with coals, having only about one foot freeboard in the waist, having laden to about one foot of her decks at that point, and having about 11 feet depth of hold, and was drawing at the time $16\frac{1}{2}$ feet; that at the time of signaling for a pilot the vessel was distant from the seaward mouth of the jetties about six or seven miles to southward and westward of the mouth of the jetties, with the wind blowing about southeast a wholesale breeze,—that is, a breeze that would carry all her canvas.

(3) That the jetties are constructed in what is known at the "South Pass of the Mississippi River," and at the seaward end consist of two parallel artificial works or embankments, extending from the land out seaward; that the original parallel embankments extending into the sea are located and constructed parallel, and about 1,000 feet apart; that subsequent to the location and construction of the original jetty-banks the channel between the jetties was constricted by lateral wing-dams, nearly at right angles to the original jetty-walls, until the actual channel between the ends of the wing-dams is about 630 feet; that this was the condition and state of the wing-dams generally on the nineteenth day of October, 1883; that the extreme end of the jetties seaward had a curvature to the westward; that the length of the artificial jetties, at the point where the east jetty commences, extends seaward about 11,000 feet; that the seaward end or entrance to the jetties is constricted and obstructed by a solid wing-dam, extending from the seaward end of the easterly jetty towards the center of the channel, and but a short distance above that is a wing-dam extending eastward from the west jetty, narrowing the entrance to about 630 feet; that seaward, and southerly from the mouth of the jetties, lying nearly in the line of the center of the channel of the jetties, is a mud lump or sand bar, having a variable

depth of water, sometimes as shallow as 11 feet, but averaging, according to the state of the water, to about 14 feet; that the effect of this obstruction, at that time, was to establish, by dividing the current, two channel-ways, through which vessels drawing 16 feet of water could pass, to enter or leave the jetties; that one of the channels was known as the "Western Channel," passing to the westward of the middle obstruction, having at that time an average depth of twenty feet, an average width of from two to three hundred feet, and in a direction nearly in a line with the direction of the channel within the jetty-walls; that the outer channel, commonly known as the "Eastern Channel," turns around the seaward end the eastern jetty, passing between that end of the jetty and the middle ground, lump, or shoal, and trending eastward, having an average depth at that time of about 26 feet; that the current between the jetty-walls and in the two sea-channels was, at that time, from three and a half to four miles an hour.

(4) That when a vessel enters the jetties by the eastern channel, and passes her bow beyond the end of the lower wing-dam on the eastern side of the jetties, the downward current through the jetties strikes her starboard bow with full force, and in order to make the turn necessary to place the ship in the middle of the space between the wing-dams, and in the direction of the channel between the jetties, it is necessary that she should be under such control, and so answer her helm with certainty, as to be able to make a quick turn and change of direction against the downward pressure of the current on her starboard bow, because, in case of failure to respond quickly to her helm, the vessel is in danger of running across, and striking the artificial works or wing-dams of the western jetty, or of sweeping back down, either on the middle ground, or on the westward bank of the western channel; that from the constricted space within which the above maneuver has to be made, it is extremely difficult to navigate a vessel propelled by sail, into the jetties through this eastern channel; that the western channel being more nearly in prolongation of the axis of the jetties, and its current being more nearly in the direction of the current between the jetties, presents less difficulty for the navigation of a vessel propelled by sail, drawing less than the depth of water in the channel; that the pilot, John Nichols, was a competent, skillful, and experienced pilot, and had a knowledge of these facts.

(5) That when the brig Helen H. Monroe was sighted, and her signal for a pilot seen from the steam pilot-boat Underwriter, at that time cruising off the mouth of the jetties, she ran down to the brig, and the pilot John Nichols was put on board of the brig; that, as soon as he boarded the vessel, a signal flag was set for the services of a steam tow-boat; that the vessel at that time being to the westward of the entrance of the western channel, and no steam tow-boat responding to the signal, the said pilot, John Nichols, concluded to

enter the jetties by the western channel,—the position of the vessel, and the direction of the wind and the state of the weather leading him to that conclusion and judgment; that, to accomplish this end, the vessel being hove to when he boarded her, he caused her to fill away, and stand on a north-easterly course until she had made easting enough to open fairly the western channel; that when she had reached that point, and had opened the channel, he caused the vessel to be put on a course necessary to take her through the western channel; that at this time, and while the vessel was on this course, the wind was fair, being abaft the beam, and the vessel had the following canvas on: She was under reefed mainsail, middle staysail, lower topsail, upper topsail, (the upper topsail being split in the seam the whole depth of the sail.) She had two jibs on the boom, and a foretop-mast staysail. The pilot caused the reef to be taken out of the mainsail; dropped the foretop-mast staysail; set the foretop-gallant-sail; this change of the forward sail being made on account of the non-serviceable character of the split upper foretop-sail.

(6) That the brig was constructed with a house on deck, abaft the mainmast, extending nearly to the rail on each side, and about five feet high; the wheel was located abaft the house, which extended very nearly to the stern, leaving a small space for the steering gear; that forward was another house constructed on the deck, used as a fore-castle and galley, higher than the after-house, and about ——— feet high; that in order to cond the vessel and keep the shore ranges, the pilot was compelled to stand on the top of the after-house, and get and keep his shore ranges by looking through under the leech of the foresail, and was unable to perform his duty and personally inspect the action of the men at the wheel, the wheel being behind him.

(7) That as soon as the pilot had put the vessel on the proper course to pass up through the western channel, he discovered that the vessel steered badly, and did not respond to the helm ordered, whereupon he complained to the master of the bad steering, and the master himself went aft, and joined the man at the wheel, there being but one man at the wheel before that time; that after the master went to the wheel there was no improvement in the steering of the vessel, the vessel continuing to fall off too much to the westward. The master then stated to the pilot that the vessel steered badly because she had too much canvas on, and that the mainsail should be taken off; and, the vessel still falling off to the westward, the pilot took off the mainsail, and almost immediately the brig grounded on the western side of the western channel, about 400 feet to the seaward, and southward of the seaward end of the western jetty.

(8) That if the vessel had responded to her helm as ordered by the pilot she would not have grounded on the western side of the channel.

(9) That when the vessel struck the ground she lost her way, and became fast; that the steam pilot-boat Jennie Wilson, belonging to the entire pilot association, ran down to her, and attempted to pull her off, but failed.

(10) That, after the vessel struck, the wind (continuing from east to south-east) increased somewhat in violence, sufficient to cause combing and breakers on the western bank of the western channel, where the vessel lay, and the waves broke over the vessel's decks.

(11) That, shortly after the vessel struck, the master ordered off a portion of the fore-hatch, and shortly afterwards left the vessel; that the master's reason, as assigned by him, for opening the fore-hatch, was an alleged apprehension on his part that the vessel might open her seams, take in water, and by the compression of the air burst her decks; that the result of opening the fore-hatch was that the sea breaking over the vessel ran over the combing of the hatch into the hold, and filled the vessel with water.

(12) That while the master left the vessel, shortly after she struck, the pilot John Nichols remained on board all night, and that before morning the vessel was full of water, and the vessel became a total wreck.

(13) That no pilotage dues for piloting the brig were ever collected or distributed to the pilots' association, and that the defendant John Ervine received no manner of benefit from the pilotage of the Helen H. Monroe.

(14) That in his attempt to pilot the brig into the port of New Orleans, the said pilot, John Nichols, exercised his best judgment, skill, and discretion in directing and piloting the vessel, and that the said vessel went aground, and the said vessel and cargo became a total wreck, by reason of the narrow channel of the jetties, the rapidity of the current therein, the fault of the vessel in not answering her helm, combined with the exercise of mistaken judgment of the pilot John Nichols in allowing the mainsail to be lowered, and to that extent the said vessel and cargo became a total wreck by a peril of the sea.

(15) That the master was part owner of the said brig, and that his interests in the freight money and cargo were insured, and the said brig and cargo were insured for the owners, and all the said insurance has been paid by the insurers as a total loss by a peril of the sea.

(16) That the value of the said brig was \$12,000, the freight was worth \$2,200, and the cargo was worth \$2,500.

And the court does find as conclusions of law, as follows:

(1) That the said Association of Branch Pilots did not and does not constitute what is known in Louisiana as a commercial partnership, in which the partners are liable *in solido*.

(2) That the said association is not an insurer of the experience, skill, judgment, or conduct of any of its members, and therefore, when without fault itself, it is not liable for the negligence, want of skill, or faults of any Branch Pilot belonging to the association, resulting in

damage to any vessel that such pilot may undertake to pilot into the Mississippi river from the sea.

(3) That said John Nichols, having, in piloting the said brig, used his best skill and judgment, is not liable for the loss of the said brig and cargo, although the result shows that his best judgment was wrong.

(4) That the libel ought to be dismissed.

THE JAMES T. EASTON.¹

THE AMERICAN EAGLE.

DOTY v. THE JAMES T. EASTON and another.

(District Court, S. D. New York. April 23, 1886.)

COLLISION—TUGS AND TOWS—HELPLESS SITUATION—UNWARRANTED SUPPOSITION BY PILOT—HIGH WIND.

While the tug Easton lay about 400 feet off Pier 3, East river, between two canal-boats, which she was about to take in tow, but which were not yet fastened to her, the tug American Eagle came around the Battery, and her pilot, seeing the position of the Easton, supposed that she was about to move ahead, and consequently did not check his speed till his tow collided with libellant's boat, on the starboard side of the Easton. The Eagle's engines were reversed, but the high wind prevailing at the time drove her tow again upon libellant's boat, whereby the latter was sunk. *Held*, that the collision was due to the inattention and fault of the pilot of the Eagle in not keeping out of the way of the Easton, and the unwarrantable supposition that the Easton was ready to move on; *also*, that the Easton was in no fault, as she was where she had a right to be, and was pursuing the customary course, and because her situation rendered her practically helpless.

In Admiralty.

T. C. Campbell, for libellant.

Owen & Gray, for the James T. Easton.

Carpenter & Mosher, for the American Eagle.

BROWN, J. Between 6 and 7 o'clock on the morning of the twenty-fifth of October, 1884, the steam-tug James T. Easton took two canal-boats from the end of Pier 3, East river, out into the stream, for the purpose of towing them to Newtown creek. The tide was slack at the last of the ebb; and the tug, having in the customary manner first backed out with the boats, until about 400 feet from the end of the pier, as I find from the proofs, there stopped, and turned the boats around so as to head towards the Brooklyn shore. She then went in between the two, in order to fasten the libellant's boat upon her starboard side and the other upon her port side. While in this

¹Reported by Edward G. Benedict, Esq., of the New York bar.

position, and engaged in making the lines fast, and before the fastenings were so far completed that the tug could move with safety, the steam-tug American Eagle came out of the North river around the Battery with four barges in tow, in two tiers of two each, upon a hawser of 70 fathoms length, bound for Pier 4, East river. After rounding the Battery the tug's engines were checked so as to shorten the hawser, as usual, preparatory to landing at Pier 4. The wind was strong from the south-west. The pilot, seeing the Easton between the two boats of her tow, supposed that the Easton was ready to move on; and, believing that she would get out of the way, kept on his course directly towards the Easton until the Eagle struck the libelant's boat about mid-ships. Little damage was done by this first blow. The Eagle's engines were reversed full speed, but the wind was so high that, though she backed against the barges with her full power, she was unable to check the momentum of the barges, and the tug was forced by them upon the libelant's boat a second time, doing her so much damage by the last blow that she sunk, and became a wreck not worth repairing.

Upon the above facts the fault of the Eagle appears plain. The force of the wind, and its natural effect upon the barges, were known to the pilot, and he was bound to guard against them. *The Raymond*, 26 Fed. Rep. 281. The Easton was in the usual place of making up tows. She was pursuing the usual methods. She was in full view. The pilot of the Eagle understood perfectly that she was taking on her tow, and designing to go up the East river. But his supposition that she was ready to move on, and would do so before he should reach her, had nothing in the circumstances to justify it. The Easton had done nothing to mislead him, or to induce that supposition. She was lying substantially at rest. There was nothing to prevent the Eagle from stopping earlier, and waiting astern of the Easton until she should go on; or, if the pilot of the Eagle preferred to go ahead, there was nothing to prevent his going upon the outside of the Easton, and crossing her bows upon the proper signal, if there did not seem to be sufficient room to go on the inside of her. There were no other vessels in the way.

Upon the libelant's evidence, which disinterested witnesses confirm, I am satisfied that there was a space of fully 300 feet clear of water available to the Eagle between the Easton's tow and the piers; and that this was abundant room for the Eagle to go inside of the Easton, even in the strong wind that prevailed, if she had made timely preparations for doing so. The pilot of the Eagle testifies that he rounded the Battery some 600 yards from the shore. He had abundant time and space to make proper preparations in season to go inside of the Easton, directly to his destination at Pier 4. His testimony indicates, however, that he did not notice the Easton until off the ferry slip. This was tardy, and shows an insufficient lookout. He then hailed the Easton two or three times to go ahead; but as

the lines were not yet fastened the Easton could not move. The fault of the Eagle clearly was inattention to the Easton in time, and the unwarranted supposition that she was ready to move, and get out of the way.

2. I do not think the Easton can be charged with fault. As I have said, she was substantially at rest. She was as helpless as a vessel at anchor, as she could not move without endangering her tow, which was only partly fastened. She was in no fault in making up her tow in the customary place, and in the usual manner. All the details of this process were familiar to the pilot of the Eagle. She was far enough away from the end of the pier to allow reasonably sufficient room for any boats having occasion to go inside of her to do so without danger. She was not, therefore, an unlawful obstruction to navigation, nor did she interfere with the customary use of that part of the river which is devoted by law to the use of tugs and tows. She had a right to do precisely what she was doing; and, as she was helpless for the time being, the whole duty of keeping out of the way devolved on the Eagle. Being in full view of all approaching vessels, and at a sufficient distance to enable them to keep away from her while getting her tow in readiness to move, her pilot had no reason to suppose the Eagle would not go on one side or the other of him. When he saw the Eagle coming towards him, and not changing her course, he hailed her to keep off. There was nothing that he could do more, since he could not safely move forward or back. There is no ground for holding the Easton in fault. Being at rest, it was not her duty to signal with her whistle to the other tug. If she had done so, by giving either one blast or two blasts, when she was unable to move, she would thereby have misled the Eagle; because such a signal would be telling her, in effect, that the Easton was going to move either to starboard or to port, whereas she could not do either. If any signals were to be given, it was for the Eagle, as the vessel in motion and in command of herself, to give the signal; and no signals were given. The most appropriate answer to any signal from the Eagle would have been several short blasts, to indicate danger. In the case of *The Sunnyside*, 91 U. S. 208, the circumstances were wholly different. The steamer was not at rest, but drifting at the rate of a mile and a half an hour in the night-time, with her helm lashed down; nor was she incumbered by a tow, so as to prevent her moving.

3. The libellant's boat had been long in use, and there is considerable conflict as to her value and soundness. Upon the best judgment I can form upon this point I think she was worth about \$400, for which sum, and costs, the libellant may take a decree against the American Eagle, unless a reference be desired. As against the Easton, the libel should be dismissed; but as its answer presented claims which were not sustained, the dismissal in her case must be without costs.

THE SILICA v. THE LORD WORDEN and another.¹

THE LORD WORDEN v. THE SILICA and another.

(District Court, E. D. Pennsylvania. March 23, 1886.)

COLLISION—NEGLIGENCE—DAMAGES.

Where a vessel in the tow of a tug runs into another vessel, partly through the negligence of the tug and partly through the improper position of the vessel run into, *held*, that damages and costs could be recovered against both.

In Admiralty.

Charles Gibbons, for the Silica.

Henry R. Edmunds, for the Lord Worden.

Alfred Driver and J. Warren Coalston, for the Protector.

BUTLER, J. As is usual in collision cases, we have here a great mass of conflicting testimony. The statements of witnesses from the respective vessels are contradictory and irreconcilable, to such extent as to make a satisfactory conclusion difficult of attainment from this testimony alone. Fortunately the case does not rest on this testimony. There are several well established facts, about which little if any controversy exists, that furnish a reasonably safe guide to the truth.

Immediately after the collision the Lord Worden was lying on the range of lights. Attention was called to this fact at the time, and it was observed by all present. It is testified to, substantially, by the Lord Worden's witnesses. Unless, therefore, the Silica's blow changed her location, she was there when struck. That the blow did not change her location, is shown by the answers of the assessors. That it would not, must, I think, have been inferred in the absence of this testimony. The relative weight of the vessels, and the character and position of the blow, seem to forbid any other inference. The conclusion that the Lord Worden was lying, substantially, on the range of lights is therefore, not only reasonable, but unavoidable. That this was a fault is equally clear. She had no occasion to lie there. As the assessors state, and the chart shows, she could have anchored elsewhere, with safety. Her anchorage there, directly on the track of navigation, after night, was a plain violation of law and duty; and this fault contributed immediately to the disaster. It is not important, in this respect, that the tow might have passed safely by the exercise of such care as the occasion required. But for the ship's fault, the disaster would not have occurred,—would have been virtually impossible. Had she been anchored to one side, as she should, no danger would have been encountered, for the tow was moving, virtually, on the range.

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

Was the tug also in fault? Whether the Lord Worden's lights were up, and of usual brightness, need not be considered. Without lights she could probably have been seen a mile away. She was seen, as is admitted, in ample time to avoid collision. That the tug did not change her course immediately on coming within view is clear. That she was running directly for the ship, or virtually so, is manifest from the fact that she changed her course *five points*, 56 degrees,—an extent of variation wholly unnecessary, and improper, if her original course was to one side of the ship. That she negligently continued the original course until within dangerous proximity, is equally manifest from the fact that her change when made was as abrupt and great as possible,—the turn as nearly at right angles as she could make it. The first order to her wheelsman and tow, was "hard a-star-board." Nothing but the presence of actual danger would have justified, or even suggested, such an order. The weight of the direct testimony is to the same effect,—that the order was given when near the ship. The change, moderate in extent, should have been made higher up,—immediately on discovering the obstruction. The character of the tow,—its make-up,—though not unusual or improper, was such as to render it difficult of control, (especially on an ebb tide,) requiring unusual care in an obstructed channel. The tug should therefore have proceeded with caution, on discovering the ship in her way. Instead, she neither slackened her speed nor changed her course until so near that danger was manifest, when, in apparent alarm, she put her wheel hard down,—sheering as nearly square off as possible,—swinging her tow in the direction of the ship, where its momentum must carry it nearer.

It looks as if the tug ran down as she did, to speak the ship,—possibly with a view to further employment. That she did approach near enough to do so, and did speak her, is clear; and the answer received though irrelevant to the question, is very significant: "Keep off; keep off." Up to this moment she had held her course, and was then so near as to alarm the lookout, who gave this warning. As if appreciating the danger, she then immediately sheered to the full extent of her capacity. The tug was therefore also in fault.

Was the Silica in fault? If Ludwig Dorsch, her wheelsman, is believed, she was. He says he put the wheel to *port*, thus sheering towards the ship. Whether this would be a material fault, if it existed, in view of the situation and the answer of the assessors, need not be considered. I do not believe him. The character of the man; his act of running off with his employer's money in his pocket; the peculiar circumstances under which he was brought back, and his testimony obtained,—forbid that any weight should be attached to what he has said. He is not corroborated. It is true that one or two witnesses say the Silica seemed to sheer westward; but, as the assessors and Capt. Shackford and Lieut. Wykoff state, she would appear to do this momentarily, under the influence of her hawser,

even with her wheel to starboard. As the Gulnare's stern swung westward in coming around, in obedience to her helm, she would necessarily give the Silica's head the appearance, at least, of turning in that direction. It may be said the Silica was in fault for employing such a man as Dorsch. He appears, however, to have been reasonably competent for his duty, and to have discharged it properly down to this point.

Aside from this man's testimony, I find no evidence of fault in the Silica. It was her duty to keep off the ship if she could. I believe, however, she could not. Following in the wake of the Gulnare, with the ship directly ahead, or virtually so, she could not see it until the Gulnare sheered. I am not unmindful of the testimony that the ship was seen slightly off the starboard bow of the vessel ahead. So much depends, however, in this respect, on the place where the observer stood, and upon the heading of the vessel at the moment, that this testimony is not entitled to much weight. "Slightly off the starboard bow" signifies very little. As already stated, the abrupt and remarkable departure from her course, by the tug, leaves no doubt that the ship was nearly, if not quite, directly ahead, and very close. Seeing the Gulnare sheer, it was her duty to follow gradually, taking care not to interfere with the movements of that vessel. Pursuing this course,—the only one allowable,—the collision seems to have been inevitable. The abrupt sheer of the tug so near the ship would necessarily swing the tow around across the channel, and before the Silica could be straightened up and pulled off by her hawsers, the momentum would carry her so far down as to render escape impracticable. The testimony shows that the Gulnare passed the ship much closer than the tug. The cause which thus carried the former closer than the tug, would operate, even in a greater degree, against the Silica, as the assessors state. She, it seems probable, would pass at least as much closer to the ship than the Gulnare, as the latter did than the tug.

The effect of sheering as the tug did; the duty of the vessels in tow, under the circumstances; the influence of the hawsers; the manner in which the vessels would come around; and the probable consequences,—are so fully and intelligently explained by the expert testimony of Capt. Shackford and Lieut. Wykoff, of the United States navy, and particularly by the latter, at pages 90 and 101-104 of the Silica's evidence, and by the answers of the assessors attached hereto, that I desire to call especial attention to this testimony and the answers.

A decree will be entered accordingly.

THE RAVEN.¹

(District Court, D. Massachusetts. April 19, 1886.)

SALVAGE—TOWAGE—PRIOR CONTRACT—ASSISTANCE RENDERED AT THE REQUEST OF SALVOR—COMPENSATION—COSTS.

The brig R., while in distress, was assisted by a tug, the latter vessel agreeing, for a fixed price, to take the former to her destination, and to furnish a second tug if necessary. While engaged in towing the R. the tug's hawser parted, and a signal for assistance was made by the tug to a second tug, then lying in the vicinity. The dismantled condition of the R., and the presence of dangers of navigation, increased the necessity for assistance, but there was ample time and opportunity for the first tug to have picked the R. up again without the help of the second. *Held*, that the service rendered by the second tug at the request of the first was that of ordinary towage, and that the proper compensation was the usual towage charge allowed by the custom of the port to a tug when called upon to assist another in towing. *Held, also*, that the payment of a sufficient sum having been offered (and declined) the claimants are entitled to costs.

Libel for Salvage by the owner, master, and crew of the steam-tug William H. Clark against the brig Raven.

C. T. Russell, for libelant.

F. Cunningham and *E. N. Hill*, for claimants.

NELSON, J. As the brig Raven, of Machias, Maine, from Jamaica with a cargo of logwood, was approaching Boston harbor on the morning of January 16, 1886, in a violent gale of wind from the N. E., with thick snow, she was obliged to come to anchor two miles east of Point Allerton. Finding that the brig was dragging her anchors, her master ordered the topmasts and yards to be cut away to keep her from drifting on shore. At 1:30 P. M., while lying in this position, the gale having broken, and the wind shifted to S. W., she was taken in tow by the tug John Markee, under a contract by which the tug undertook to tow her to Boston, dock her, furnish the services of another tug, if found necessary, and afterwards to return and get her anchors and chains, which, owing to the heavy sea, and the disabled condition of her windlass, she was obliged to slip; for which service the tug was to receive \$200. Before reaching Boston Light the hawser parted twice, but was made fast again each time without difficulty. When between Boston Light and Nash's Rocks the hawser parted a third time, and the master of the John Markee signaled to the William H. Clark, then lying in the vicinity looking for employment, for assistance. In answer to the signal the William H. Clark steamed up to the brig, threw her a heaving line, and a hawser was hauled on board the brig and made fast. The hawser of the John Markee was then again hauled on board, and made fast to the brig, and the two tugs together towed her to her dock in Boston. For the assistance thus rendered the William H. Clark now claims salvage.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

I am unable to perceive in this anything more than ordinary towage service, rendered at the request of the John Markee. The brig being without available sails or anchors, with the wreckage of her spars dragging at her side, would certainly have been in imminent danger of drifting on the rocks upon Light-house Island, if she had been alone, and had not already secured all the assistance necessary for her safety. It is true the hawser of the John Markee had proved inadequate to tow her in the rough sea against a strong ebb-tide. But it was of sufficient strength to hold her stationary, or to tow her with the current, or across it in either direction, to a position of safety. The weather had cleared, and the wind, though strong, had ceased to be in the least degree dangerous. The tug-boat York, the consort of the John Markee, was coming down the harbor to help her. The hawser of the John Markee parted at the hawse-hole, and was still of sufficient length for use. The only disputed fact in the case was with reference to the distance of the brig from the rocks at the time the William H. Clark took hold. Of course the estimates of the witnesses varied widely, some of them placing her on the north-erly side of the channel, close to Light-house Island, and others on the opposite side, near Nash's Rocks. The keeper of the light-house, a disinterested and intelligent witness, who saw the occurrence, testified that the William H. Clark took hold about the middle of the channel. This would make the distance on the oblique course of the brig's drift considerably more than an eighth of a mile. I take his estimate as the correct one. This would give the John Markee ample time to come to the rescue. It also appeared that the master of the William H. Clark claimed at the time only the usual towage charge allowed by the custom of the port to a tug when called upon to assist another in towing a vessel. It should also be noted that it is not pretended that the William H. Clark was exposed to any extraordinary peril, or to any risk but such as was incident to her every-day employment. My conclusion is that the services of the William H. Clark were towage, and not salvage, services.

It appeared that the master of the Raven offered to pay \$80 for the services rendered, which was declined by the agent of the William H. Clark. The compensation offered was sufficient, and should have been accepted. A decree may be entered for that amount for the benefit of the owners of the tug, but the claimants of the brig are to recover their costs. Ordered accordingly.

BARGE No. 6.¹

BIRCHALL v. BARGE No. 6.

(District Court, S. D. New York. April 22, 1886.)

WHARFAGE—HELL GATE—TOW IN SECTIONS—NEW YORK STATE STATUTE—LAWS OF 1882, CH. 410, § 798—"USES OR MAKES FAST TO WHARF"—LIABILITY OF BOTH TUG AND TOW—DEMAND—DOUBLE RATES.

A law of New York, passed in 1882, (chapter 410, § 798,) provides that wharfage may be collected "from every vessel that uses or makes fast to any pier, wharf, or bulk-head," within the city of New York. In 1883 libellant gave general notice that wharfage would be required. Afterwards, a tug having agreed to tow barge No. 6 for a lump sum, and having taken her with many others in tow, left her with others at libellant's wharf, between One Hundred and Thirty-ninth and One Hundred and Fortieth streets, East river, and the libellant claims wharfage. The barge-owner claimed that the tug-boat should pay the wharfage, since it was for the latter's convenience that the barge was left at the bulk-head. It has long been the practice for tugs taking large tows through Hell Gate to divide them into sections, and, taking one section at a time through the Gate, to leave the rest at the libellant's wharf till they are successively taken through. *He'd* that, under such circumstances, the tug "uses" the wharf, in the sense of the statute, and is liable; but that the barge is "made fast" to it; and that wharfage may therefore be collected of either. Demand not being clearly proved, only single wharfage can be collected.²

In Admiralty.

T. C. & G. N. Campbell, for libellant.

Biddle & Ward, for respondent.

BROWN, J. The libellant has been for many years owner and proprietor of the bulk-head between One Hundred and Thirty-ninth and One Hundred and Fortieth streets, on the East river. This libel is filed to establish his right to collect wharfage from barges and canal-boats that are left at his wharf, and made fast there by tugs, preparatory to towing them through Hell Gate. It is not deemed prudent for tugs to attempt to take more than three or four boats at a time through Hell Gate; but as many more than four are often taken in tow from the lower part of the city bound east into the Sound, it is necessary in such cases to take the fleet through Hell Gate by sections; and tugs have, for a long time, been in the habit of leaving a part of the fleet at Birchall's wharf, while they are taking the rest of the fleet by sections through Hell Gate. By the state statute of July 1, 1882, relating to the city of New York, (chapter 410, § 798,) it is provided that "it shall be lawful to charge and receive wharfage at the following rates from every vessel that uses or makes fast to any pier, wharf, or bulk-head within said city," etc., "for every barge, 50 cents per day; * * * every vessel to be liable for double

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

² Respecting wharfage see note of Orlando F. Bump to *The De Smet*, 10 Fed. Rep. 489, and *Ouachita & Mississippi River Packet Co. v. Aiken*, 16 Fed. Rep. 890, and note, 894-396.

wharfage if she leaves without first paying the wharfage due, after being demanded of the owner or consignee or person in charge of the vessel."

Prior to the passage of the above statute no claim for wharfage had ever been made by the libellant. In 1883 the libellant gave notice that thereafter he should demand and claim the wharfage allowed by the above statute. There is no doubt that he is entitled to wharfage either from the tug, or from the boats that are fastened to the wharf. As between the tug and the tow each claims that the other shall pay it. The boats in tow have no control of their own navigation. The person in charge of each has nothing to do in determining how many shall be taken in tow, or whether they shall be divided up in going through Hell Gate; or, if divided, where any shall be left, or how secured, or how long they shall remain, or when they shall be taken away. The whole business of making up the tow, the numbers taken, and the mode of going through Hell Gate, is solely in charge of the tug, and the tow is legally in the charge and possession of the tug. In the usual course of business each boat is taken at a fixed sum for the trip. Part of the boats may be left at the wharf until the others have gone through, while others may go through directly; and in respect to the latter no claim for wharfage can accrue. When towage is engaged no reference is made to any wharfage, and it is not known whether any claim for wharfage in respect to any particular boat will arise. The use of the wharf is for the convenience of the tug, and to enable her to take a larger fleet along with her on each side of Hell Gate than she can take through that passage. The tug having the tow in charge, and being answerable for its safety, when she leaves a part of the tow at a wharf for her convenience, in my opinion, "makes use" of the wharf in the sense of the statute. It is by the voluntary act of the tug, and not by any voluntary act of the tow, that the tow is made fast to the wharf. On the other hand, it is equally clear that the tow is "made fast" to the wharf, and has the use of it for the time being. The statute declares that every vessel that either "uses or makes fast" shall be liable to pay wharfage. The wharfinger, therefore, has a right under the statute to look either to the tug or to the tow for his statutory compensation. He is not bound to look to the tug alone. From the circumstances stated, it would seem that the tug is bound to indemnify the owner of the tow for the charges to which the tug, for her own convenience, has subjected a portion of the boats; but as the representatives of the tug are not before me, this question is not passed upon.

There is some doubt whether the explicit demand of wharfage was made in this instance from the person in charge of barge No. 6. The bills proved have the names of the towing lines upon them, and the proof leaves the question of demand doubtful. Judgment is therefore ordered for the libellant for the wharfage claimed at single rates only, with costs.

THE FAVORITE.¹

PETERS, Master, etc., v. HELLER and others.

(District Court, E. D. Pennsylvania. March 26, 1886.)

DEMURRAGE—DELAY IN UNLOADING.

Damages can be recovered for delay in unloading upon vessels, where the cargo could have been discharged more quickly upon railroad cars.

In Admiralty.

Pugh & Flanders, for libelant.

Furth & Singer, for respondents.

BUTLER, J. The libelant must be allowed two days. The detention was unnecessary. The unloading might have been completed without interruption, if the respondent had been willing to receive it on cars, which were at hand. He desired, however, to have a part of it on vessels, and delayed the work on this account. Having sold the cargo, he desired to deliver it to the several purchasers immediately from the ship. Fully two days' delay was caused in waiting for vessels, and in changing the unloading tackle back and forth from vessels to cars. For this delay the libelant must be compensated. A fair measure of computation is found in the charter-party. I do not find anything to sustain the allegation that the crew were inefficient, and the unloading delayed on this account.

A decree will be entered for libelant.

THE E. H. PRAY.²

(District Court, E. D. New York. July 24, 1885.)

SALE—STOPPAGE IN TRANSIT—ASSERTION OF VENDEE'S INSOLVENCY—NON-DELIVERY OF CARGO—BILL OF LADING—VENDEE'S RIGHT OF ACTION.

A cargo of clay was shipped by H. on board the schooner E. H. Pray, under a bill of lading providing for its delivery to P. Before the delivery of the clay H. appeared, and, asserting the insolvency of the libelant, and the non-payment of the price, ordered the master not to deliver the clay to P., which direction the master obeyed. P. thereupon brought suit on the bill of lading against the vessel to recover damages for non-delivery of cargo. *Held*, that the assertion of the fact of insolvency by the vendor, made in good faith and believed by the master, coupled with the fact that the goods had not been paid for or the price secured, and the other fact that the stoppage was during the continuance of the *transitus*, justified the master in delivering the cargo to the vendor, and gave the vendee no right of action against the vessel.³

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

² Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

³ See note at end of case.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libellant, Samuel L. Pewtress.

Benedict, Taft & Benedict, for claimant.

BENEDICT, J. One Hayes, upon the order of the libellant, shipped on the schooner *E. H. Pray* a cargo of clay, for which the master of the schooner issued to Hayes a bill of lading in the ordinary form, providing for the transportation of the clay from Amboy to New Haven, and its delivery there to the libellant on the payment of freight. One copy of this bill of lading, together with an invoice of the clay, Hayes furnished to the libellant, who received the same. Upon the arrival of the vessel at New Haven, and before the delivery of the clay, Hayes appeared, and asserting the insolvency of the libellant, and the non-payment of the price of the clay, required the master of the vessel not to deliver the clay to the libellant, but to take it to New York. The master of the vessel obeyed the directions of Hayes, refused to deliver the clay to the libellant, and took it to New York. Whereupon the libellant sues the schooner upon the bill of lading to recover damages for the non-delivery of the cargo to him.

Upon these facts the question is not whether Hayes, the vendor, as between himself and the vendee, could lawfully stop the clay *in transitu*; but whether, the clay having been stopped *in transitu* by Hayes, the libellant can recover on the bill of lading for non-delivery of the clay to him. Here the direction to deliver the clay to the libellant contained in the bill of lading was countermanded by the shipper, and the goods stopped by him, before delivery to the vendee or negotiation of the bill of lading. At this time the price of the clay had not in fact been paid, the *transitus* had not in fact been ended, and the insolvency of the vendee was asserted by the vendor as the reason of exercising the right of stoppage *in transitu*, and believed by the master. Under such circumstances I do not think the risk of determining the question of the vendee's solvency can be cast upon the master of the ship. As it seems to me, the assertion of the fact of insolvency by the vendor, made in good faith and believed by the master of the ship, coupled with the facts that the goods had not been paid for nor the price secured, and the other fact that the stoppage was made during the continuance of the *transitus*, justified the master in delivering the cargo to Hayes, the shipper and vendor, in place of the libellant, and gave the libellant no right of action against the ship.

In the case of *The Tigress*, Brown. & L. 45, it is said :

"The vendor exercises his right of stoppage *in transitu* at his own peril; and it is incumbent upon the master to give effect to that right so soon as he is satisfied that it is the vendor who claims the goods, unless he (the master) is aware of a legal defeasance of the vendor's claim."

Here Hayes was the vendor of the goods; he had not been paid by the libellant; there was no legal defeasance of the vendor's claim. and the vendor demanded the goods upon the ground of the insolv-

ency of the vendee. These circumstances justified the master in refusing to deliver the goods to the libellant, and constitute a good defense to such an action as this.

The libel is dismissed, and with costs.

NOTE.

The right of stoppage *in transitu* exists until the goods are delivered to the buyer, or possession, actual or constructive, is taken by him. *Hall v. Dimond*, (N. H.) 3 Atl. Rep. 423.

The seizure of personal property, consigned to purchasers, by virtue of process against their goods, does not destroy the vendor's right of stoppage *in transitu*. *Sherman v. Rugee*, (Wis.) 13 N. W. Rep. 241.

The vendor's right of stoppage *in transitu* is not defeated by the arrival of the goods at the place of destination, but is only terminated by the goods passing into the actual or constructive possession of the vendee. *Greve v. Dunham*, (Iowa,) 14 N. W. Rep. 130.

The right of stoppage *in transitu* may be asserted by the vendor of goods at any time before their delivery to the vendee by the carrier. *United States Wind Engine & Pump Co. v. Oliver*, (Neb.) 21 N. W. Rep. 463.

Where a wholesale merchant has sold goods to a retail dealer on six months' time, such merchant cannot claim the right to stop said goods in transit without showing that the purchaser is insolvent, and that the goods have not been delivered to him. *Walsh v. Blakely*, (Mont.) 9 Pac. Rep. 809.

When goods are sold on the condition that title shall not pass until they are paid for, the vendor retains the right to stoppage *in transitu*, as against the vendee, or an innocent third person who purchases of the vendee before the arrival of the bill of lading or the goods. *Pattison v. Culton*, 33 Ind. 240.

A merchant may exercise the right of stoppage *in transitu* while goods remain in the hands of the carrier. *Calahan v. Babcock*, 21 Ohio St. 281.

Where a merchant sold goods which were levied on and seized under an execution against the purchaser while they were in the hands of the carrier, and the freight charges paid, it was held that the vendor's right of stoppage *in transitu* was not terminated by the levy and seizure. *Rucker v. Donovan*, 13 Kan. 251.

The seller of goods may stop them *in transitu* on account of the purchaser's insolvency existing before, but not known to the seller until after, the sale. *Loeb v. Peters*, 63 Ala. 243.

It is said that the right of stoppage *in transitu* is lost if the purchaser has sold the goods, and indorsed the bill of lading to a subpurchaser for value in good faith. *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, *ante*, 434; *Loeb v. Peters*, 63 Ala. 243. See, also, *Newhall v. Central Pac. R. Co.* 51 Cal. 345.

THE BERMUDA.¹

(District Court, E. D. New York. December 9, 1885.)

CARRIER—OF GOODS BY SHIP—DAMAGE TO CARGO—THEFT OF JEWELRY—BILL OF LADING—EXCEPTIONS—CONCEALMENT OF VALUE—LIABILITY.

Libellant shipped on board the steam-ship *Bermuda* a trunk containing jewelry, under a bill of lading, in which the trunk was described as "merchandise," which contained the clause "weight and contents unknown," and a provision that the carrier should not be accountable for jewelry contained in any package shipped under a bill of lading unless the value was therein expressed, and extra freight paid. Libellant did not inform the carrier that the trunk contained jewelry. The trunk was opened during the voyage by some person unknown, and part of the jewelry abstracted. *Held*, on suit brought against the steam-ship for the loss, that libellant could not recover.

In Admiralty.

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

Ullo, Ruebsamen & Hubbe, for libellant.

Butler, Stillman & Hubbard, for claimant.

BENEDICT, J. The facts of this case are as follows: The libellant, Isaac H. Pereira, shipped on board the steam-ship *Bermuda*, to be transported therein from New York to Trinidad, a small-sized trunk. The trunk was shipped as merchandise under a bill of lading taken, in which the trunk was described as "one trunk merchandise," without any statement as to the value of the contents of the trunk; and which also contained a provision that the carrier was not to be accountable for jewelry contained in any package or parcel shipped under a bill of lading unless the value thereof be therein expressed, and such extra freight as might be agreed on paid. The words "weight and contents unknown" were inserted in the bill of lading before signing. The trunk, when taken on board, was placed in a regular freight compartment of the vessel, with other merchandise destined for Trinidad. In the course of the voyage the steamer stopped at various points of the Windward islands, from St. Kitts down to Trinidad, and on reaching the latter port the trunk was found to have been opened, and the fact was then first disclosed that the trunk contained jewelry. For a part of the jewelry missing from the trunk this action is brought. How the trunk came to be open does not appear, nor is it shown that the breaking of the trunk was the result of the manner or the place of stowage.

Upon these facts no recovery can be had. The case is different from the case of *Lebeau v. General S. Nav. Co.*, L. R. 8 C. P. 88, cited by the libellant, because of the provision in the bill of lading respecting jewelry. By this bill of lading the contract was to safely carry and deliver the trunk with its contents for a certain freight, provided the contents were not jewelry. But as to any part of the contents consisting of jewelry there was no contract to carry and deliver the same, owing to the omission to state the value of the jewelry, and arrange for its freight as jewelry. Such is the legal effect of a clause in the bill of lading like the one under consideration. What responsibility would attach to the vessel if it had appeared that the opening of the trunk and the purloining of its contents had been the result of any neglect on the part of the ship to bestow upon the trunk the care required for its safety as a trunk containing ordinary merchandise need not be considered. The case contains no testimony from which to infer that the loss of the jewelry arose from the neglect of any precaution required to be taken in respect to a trunk of ordinary merchandise. Libel dismissed.

THE PERSEVERANCE.¹*(District Court, E. D. New York. June 4, 1885.)***SALVAGE—FIRE—CARE OF PROPERTY—CHARGES—MARSHAL'S COSTS.**

Where three tugs had been engaged in putting out a fire on a bark at a pier in New York harbor, and the value of the property saved was reduced by the condition in which vessel and cargo were left after the fire was extinguished to \$5,477.57, the sum of \$2,100 was awarded as salvage to the tugs,—\$1,000 to the tug first at the fire, and \$800 and \$300 to the other two, respectively, with costs to each. Marshal's costs were not first deducted, but the sum paid by the ship agent in caring for and delivering the cargo was first deducted.

In Admiralty.

On the nineteenth of July, 1883, a fire broke out on a pier at Harbeck's stores, Brooklyn, at which the bark *Perseverance* was lying loaded with a cargo of jute. The fire spread rapidly from the pier to several vessels lying near, among them the *Perseverance*, and one of them, the *Lawrence Delap*, was totally destroyed. The tugs *Jack Jewett*, *Charm*, and *R. W. Burke* came to the assistance of the *Perseverance*, and towed her out in the river, and allowed her to drift towards Governor's island, in the neighborhood of which she grounded, the tugs continuing to pump streams of water on her. She was finally filled with water and the flames extinguished. The value of the vessel and cargo saved was some \$40,000, but this was greatly reduced by expenses for storage and watching. The three tugs brought an action against the property saved for salvage compensation, and offered testimony showing the relative value of their services. The *Jack Jewett* was the first of the three to arrive at the fire.

Benedict, Taft & Benedict, for the tugs.

Sidney Chubb, for claimants.

BENEDICT, J. This is an action to recover salvage compensation for services rendered by the tug *Jack Jewett*, the tug *Charm*, and the tug *R. W. Burke*, in saving the bark *Perseverance* and her cargo from destruction by fire at her berth in the dock. There is no question but that the services rendered by the tugs saved the bark from the total destruction which actually befell one ship lying at the same pier. The value of the property saved was, however, greatly reduced by the condition in which both vessel and cargo were left when the fire had been extinguished. The money realized from the sale of the property was further reduced by the method of sale adopted, in which all the parties acquiesced, including the salvors. These circumstances reduce the compensation receivable by the salvors. The value of the property actually saved is always an element of the calculation in a case of salvage. In this case I consider the value of

¹ Reported by R. D. & Wyllys Benedict, Esq., of the New York bar.

the property saved to be \$5,477.57. I do not deduct the marshal's costs from the proceeds of sale. I do deduct \$7,115.92 paid by the ship agent in caring for and delivering the cargo, and this, upon the ground that the circumstances created a charge to that amount upon the cargo in the hands of the salvors. To that extent, therefore, the property saved was reduced in value. The services rendered by the three tugs mentioned in effecting this salvage, if compensated at the rate of ordinary towage, would make the compensation rather more than \$1,800. Owing to the small amount of proceeds, they can recover but little more than this, meritorious as were their services.

Looking at all the circumstances, I fix the salvage amount for the three tugs mentioned—the Jack Jewett, the Charm, and the R. W. Burke—at \$2,100. This sum I apportion among these tugs as follows: To the Jack Jewett, which was first at the fire, for her owners and crew, the sum of \$1,000; to the Charm, for her owners and crew, the sum of \$800; to the R. W. Burke, for her owners and crew, the sum of \$300; and I further direct that the costs of the salvors be first paid out of the funds in the registry. If any further apportionment be required, it will be made on the application of the parties interested.

THE ABERDEEN.¹

(*District Court, E. D. New York. December 7, 1885.*)

SALVAGE—DERELICT—SERVICES—SUBSEQUENT ABANDONMENT.

There can be no recovery for services rendered to a derelict, however meritorious the services may be, where the derelict is abandoned by the salvors before reaching a place of safety

In Admiralty.

Wilcox, Adams & Macklin, for libelants, Herman Smith and others.

J. A. Bush, for claimant.

BENEDICT, J. There can be no question as to the merit of the services rendered by the libelants in their effort to save the derelict proceeded against in this action. But, meritorious as were the services in question, I cannot reward them, for the reason that the derelict was abandoned by the libelants before reaching a place of safety. I find it impossible, upon the evidence, to consider the subsequent bringing the derelict into port by the pilot boat to be a continuation of services begun by the libelants. On the contrary, the proof is that the libelants, owing no doubt to the necessities of their own vessel, and the hardships that had been endured, terminated their connec-

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

tion with the derelict, and left to others the labor and risk of bringing it to a port of safety. By so doing they lost the right to claim compensation for what they had done. The libel must therefore be dismissed, but no costs are awarded against the libelants, and the attention of the underwriters is called to the meritorious services disclosed by the evidence to have been rendered by the mate, and also to the fact that, when the master proposed to strip the derelict, the mate advised against it, with the result that great hardship was endured by him, accompanied with peril, in an effort to save property in which they were interested.

THE FRISIA AND THE JOHN N. PARKER.¹

KITCHIN v. THE JOHN N. PARKER.

(District Court, E. D. New York. May 11, 1885.)

COSTS — FOREIGN COMMISSION — EVIDENCE — CUSTOMARY RATE — REASONABLE CHARGE.

In the absence of evidence to show the existence at the place of executing a commission of a customary rate of charges for commissioner's services, or for like services, proof that the sum actually paid the commissioner is a reasonable sum for like work at the place of payment is sufficient to warrant the allowance of the item as a disbursement properly made to secure the execution of the commission. See S. C. 24 Fed. Rep. 495.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelants.

Benedict, Taft & Benedict, for the John N. Parker.

BENEDICT, J. In the absence of evidence showing the existence at the place of executing a commission to take testimony of a customary rate of charges for services rendered by the commissioner in executing the commission, or for like services, I am of the opinion that proof of the fact that the sum actually paid the commissioner is a reasonable sum to pay for like work at the place of payment will warrant the allowance of the item as a disbursement properly made to secure the execution of the commission. If the decision in the case of *Sedgwick v. Grinnell*, 10 Ben. 6, was intended to apply to a case where there is no proof of the existence at the place of executing the commission of a customary rate of charges for like services, I am unable to agree with it. In this case the proof is, in my opinion, sufficient to justify the allowance of \$130.25 as a proper disbursement to secure the execution of the commission.

¹Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

JOSSLYN v. PHILLIPS.¹*(Circuit Court, W. D. Michigan. March, 1886.)*

REMOVAL OF CAUSE—COSTS—ATTORNEY'S FEE ON REMAND—ACT OF 1875.

Where a case is remanded to the state court on the ground that the circuit court has no jurisdiction, the court may allow such attorney's fee as would ordinarily be allowed on the final disposition of the cause.

Motion to Allow Attorney's Fee.

Geo. F. Edwards, for plaintiff.

BROWN, J. This case was remanded to the circuit court for the county of Berrien upon motion of the plaintiff. He now moves for the allowance of a reasonable attorney's fee under the fifth section of the act of March 3, 1875. Prior to this act the rule had been never to allow costs where a case was dismissed for want of jurisdiction appearing upon the face of the record. It was considered that the court, having no jurisdiction of the case, could not even render a judgment for costs; but by the act of 1875 this rule is so far modified as to permit the court, in remanding a case, to "make such order as to costs as shall be just." The third section of the same act also requires a bond to be given for filing a transcript in the circuit court, and for "paying all costs that may be awarded by the said circuit court, if said court shall hold that the suit was wrongfully or improperly removed thereto." *Mansfield, etc., R. Co. v. Swan*, 111 U. S. 379, 386; S. C. 4 Sup. Ct. Rep. 510. This case, however, throws no light upon *what* costs the court is authorized to impose. The general fee-bill makes no provision for an attorney's fee upon motions, and it has not been our practice to allow one, unless it could be imposed as a condition of granting the motion; as, for instance, in the case of applications for continuance. But as the clerk's fee for filing the transcript is the only other item of cost likely to arise in a removed case before the motion to remand is made, and as this is always paid by the party procuring the removal from the state court, it seems to us that the statute must have intended to permit the court to impose a reasonable attorney's fee as a compensation to the party for his services in procuring the remand. In ordinary cases, these would be the only costs to which the language of the act would attach, as the motion to remand is usually made before any further proceedings are taken in the circuit court. We think it competent for the court to allow such a fee as is ordinarily awarded on the final disposition of a cause, viz., a docket fee of \$20.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

WINCHELL *v.* CONEY and another.

(Circuit Court, D. Connecticut. May 11, 1886.)

1. REMOVAL OF CAUSE—FAILURE TO ENTER RECORD IN TIME—RETENTION OF CASE IN STATE COURT—EFFECT UPON RIGHTS OF PETITIONER AND ADVERSARY.

Pending a suit in a state court to foreclose a mortgage, the plaintiff amended his complaint in order to reform the deed in technical particulars. One of the defendants thereupon filed his petition to remove to the federal court upon the ground that, by force of the amendment, a new and separable controversy had been added. The state court proceeded with the case, and the defendant did not enter the record in the federal court on the first day of the next term. The plaintiff subsequently entered the record and moved to remand. *Held*, that the defendant had a sufficient excuse for not entering the record, and that the cause should not be remanded for that neglect.

2. SAME—SEPARABLE CONTROVERSY—FORECLOSURE OF MORTGAGE—REFORMATION OF DEED.

Held, that the prayer for a reformation of the deed was merely incidental to the main object of the complaint, viz., a foreclosure, and did not create a separable controversy within the meaning of the act of 1875, and that the plaintiff's motion to remand should be granted.

Motion to Remand.

John W. Alling, for motion.

John H. Whiting, against motion.

SHIPMAN, J. This is a motion to remand the above-entitled cause to the state court. The facts are disclosed in the copy of the record which has been entered in this court. After the cause had been remanded to the state court upon the first petition for removal, for the reason that the two defendants were necessary parties to the suit, (*Coney v. Winchell*, 116 U. S. 227; S. C. 6 Sup. Ct. Rep. 366,) the state court, at its September term, 1885, which was the term next succeeding the one to which the suit was brought, took jurisdiction of the case, and proceeded with the trial thereof. A plea in abatement to the jurisdiction was overruled, and the argument of the defendants' demurrers was commenced. This argument showed that the defendants claimed, upon somewhat technical grounds, that the condition of the mortgage failed to state that the interest was payable annually, and that the mortgage did not show that the interest had become due. The notes were payable in five years from date, "with interest annually, at 6 per cent." The condition in the mortgage described the notes as bearing interest at 6 per cent. per annum, "and payable five years from date."

The plaintiff, during the argument of the demurrer, moved to amend his complaint, which motion was allowed, and he thereupon, at said term, amended by inserting, in addition to the allegations and prayers of the complaint, allegations of a mutual mistake of the parties to the deed in the description in the condition of the interest clause of the notes which were intended to be secured, and a prayer for a reformation of the deed. The defendant Coney thereupon, at

said term, filed his second petition for removal upon the ground that, by force of said amendment, a new and separable controversy, which was wholly between citizens of different states, and could be fully determined as between them, not before contained in said suit, had been added thereto, viz., a controversy as to the reformation of said mortgage deed as against the petitioner. The state court did not decline to proceed further with the suit, but went on with it, and is still proceeding therewith. Coney did not enter a copy of the record in this court on the first day of the April term, A. D. 1886, which was the first term of this court after the September term, 1885, of the state court. Subsequently, upon contested motion to that effect, which was filed on the second day of the term, the plaintiff obtained leave to enter the transcript in this court; and, having entered it, now moves to remand the cause to the state court for divers reasons, one being that the defendant did not enter the record within the statutory time, and the other being that the cause was not and is not removable to this court. The defendant pleads upon divers grounds that the court ought not to take cognizance of the plaintiff's motion.

When the party who petitions for a removal from the state court neglects to enter the record in the circuit court in time, his adversary is permitted to go into the circuit court, and have the cause remanded on that account. The fact that the petitioning party was compelled to remain in the state court, and there litigate his case, is a sufficient excuse for his not entering the record in this court upon the first day of the term. *Railroad Co. v. Koontz*, 104 U. S. 5. The cause should not be remanded for that mere neglect.

But the fact that the petitioning party had such sufficient excuse, and that the case ought not to be remanded on that account, does not prohibit this court from looking into the record, and seeing whether it can take further jurisdiction of the cause, and whether it was ever properly removable. The plaintiff, if a cause appears upon the face of the record not to be removable, is surely not bound to wait for an adjudication of that question until the defendant has taken out his writ of error or appeal from the state court, and the case is reached for trial in the supreme court at the end of two or three years from the date of the appeal. This court has now, from the fact that the transcript has been properly entered therein by a party entitled to enter it and to move to remand, power to inquire whether the suit "really and substantially involves a dispute or controversy properly within the jurisdiction" of this court, and, if it answers that question in the negative, to remand the cause to the court from which it was removed. Section 5, Act March 3, 1875.

Upon the original complaint the complainant had but a single cause of action, and that his mortgage. *Coney v. Winchell*, *supra*. After the legal contest had commenced by the argument of the demurrers, the plaintiff, out of abundant caution, for the purpose of guarding against a question made by the defendants, deemed it best

to ask for an amendment of his complaint, and by the amendment to ask for a reformation of the mortgage deed. This new issue was "incidental to the main object" of the complaint, viz., a foreclosure; and the mortgage continued to be, as before, the single cause of action. If by the amendment the case could be said to be capable of division into two separate parts,—a reformation of the deed and a foreclosure of the mortgage,—such separation was a theoretical, and not an actual, one; for the real controversy was and is single,—a foreclosure of the mortgage,—although, as a means and ancillary to these ends, technical rules might also require a reformation of the deed. The controversy was not a separable one within the construction which the supreme court has given to the second clause of the second section of the act of 1875,—a construction which is both reasonable and free from technicalities which would tend to embarrass litigants.

It may be added that the supreme court of errors of this state, which has recently considered the question in the case, has decided that the condition of the deed was sufficient; that there was an omission, but no mistake; and that there was no necessity for amendment; and therefore that the complaint may properly be regarded as merely one for foreclosure of a mortgage; and that the prayer for a reformation of the deed is surplusage.

A decision that there was no separable controversy when the second petition was filed, renders unnecessary a discussion of the question whether, if the amendment did make such a controversy, the second petition was brought within the statutory time.

The motion to remand to the state court is granted, with costs to be taxed.

MANHATTAN BEACH Co. v. HARNED and others.

(Circuit Court, S. D. New York. May 8, 1886.)

1. CORPORATIONS—CAPITAL STOCK—CERTIFICATES—EFFECT.

Certificates of stock, issued as evidence of the ownership of the shares, are the *indicia* of title, and are treated as representing the shares themselves.

2. SAME—ASSIGNMENT OF CERTIFICATE—RESULTING EQUITIES.

Although the assignment of a certificate of stock can pass only the beneficial interest of the assignor, the rights of the assignee will be protected at law and in equity as if he were the purchaser of the legal title to tangible property or negotiable paper.

3. SAME—RIGHTS OF PURCHASER OF STOCK—RELIANCE UPON DILIGENCE OF CORPORATION—RECITALS IN CERTIFICATE—FRAUDULENT ISSUE BY AGENT.

The purchaser of stock has a right to rely upon the diligence of the corporation, and to put faith in the recitals contained in the certificate issued by its agents while acting within the general scope of their powers, even though it afterwards appears that such certificate was issued through the negligence or malfeasance of such agents.

4. SAME—BONA FIDE PURCHASER—RIGHT TO CERTIFICATE ISSUED UPON SURRENDER OF ONE FRAUDULENTLY ISSUED BY AGENT.

The complainant, through the fraud of an employe, issued a certificate of stock in due form reciting that G. was the owner of 100 shares. G. was not

a stockholder. The name of G. was simulated to a transfer of the certificate. The defendants bought the certificate for value. Thereafter they presented it to the complainant, surrendered it, and received a new certificate. They were not notified of the fraud until the employee had absconded. *Held*, that defendants could not rely upon an estoppel upon the purchase of the certificate because the issuing of the certificate by complainant was not the proximate cause of injury. But when complainant issued the new certificate to defendants without discovering and notifying defendants of the fraud until the forger had absconded, an estoppel arose, because defendants, in reliance on the conduct, was induced to omit taking proceedings to obtain restitution.

Alfred C. Chapin, for complainant.

F. F. Marbury and John R. Dos Passos, for defendants.

WALLACE, J. This bill is filed by the complainant, a Connecticut corporation, to restrain the defendants from transferring, and to compel them to surrender to complainant, a certificate for 100 shares of the complainant's capital stock, which was delivered by complainant to defendants on or about the twelfth day of February, 1884.

The following facts appear by the pleadings and proofs: In October, 1883, certificates of stock, representing 80 per cent. of the whole capital stock of the complainant, had been issued and delivered by it to subscribers, the remaining 20 per cent., consisting of 10,000 shares, being still held by it. In that month one Fullerton, who was a clerk of the complainant, in fraud of the corporation, filled out a number of blank certificates, inserted in them the names of fictitious persons, together with the proper recitals to show that they were holders of a specified number of shares of stock, presented the certificates to the proper officers of the complainant for their signatures, obtained their signatures, and subsequently negotiated the certificates with parties unknown. Among these certificates was one in which the name of Charles Gray had been inserted, with the recital that he was the owner of 100 shares of the capital stock of the corporation, transferable on its books on surrender of the certificate. It was attested by the president and treasurer of the company, and was in all respects regular in form. Upon its back was an assignment and power of attorney in blank authorizing the transfer of the shares. In February, 1884, the defendants, who were members of the New York Stock Exchange, bought in the usual way at the exchange 100 shares of the stock of the corporation, and the day after the purchase received a certificate from the vendors in accordance with the usages of the exchange, and paid the purchase price. The certificate delivered to them was the one which had been fraudulently prepared and put out by Fullerton, containing the name of Gray. The name of Gray was written under the assignment and power of attorney on the back of the certificate, and the signature was authenticated by the signatures of the brokers of whom the defendants purchased the stock. The defendants accepted the certificate in reliance upon this authentication as to the genuineness of Gray's signature. In order to have the stock transferred to themselves on the books of the complainant, the

defendants presented the certificate a day or so after they received it at the office of the complainant for surrender. It was received by the complainant's agents, who retained it for a day or two, transferred the shares upon the books of the corporation to the defendants, and delivered to the defendants a new certificate, which is the one in controversy. About a month thereafter Fullerton absconded, and his fraudulent practices were discovered. Thereafter the officers of the complainant notified the defendants of the facts discovered, and demanded the return and surrender of the certificate. This bill was filed early in May, 1884.

The case turns upon the law of equitable estoppel. Shares of corporate stock are dealt with in the market like negotiable paper or chattels; and the certificates issued as evidence of the ownership of the shares are the *indicia* of title, and are treated as representing the shares themselves. The title to a certificate implies the title to the shares themselves, and passes to a purchaser by a delivery of the certificate indorsed in blank. Although the assignment of a certificate can only pass the beneficial interest of the assignor, the rights of the assignee will be protected at law and in equity as if he were the purchaser of the legal title to tangible property or negotiable paper. If the defendants had acquired title from Gray, the complainants could not be permitted to deny that they had obtained a valid title to the shares. A certificate of shares, properly issued by a corporation having power to issue stock certificates, is an affirmation by the corporation to all who may innocently purchase the certificate that the person to whom it is issued is the owner of the number of shares of the capital stock of the corporation specified in the instrument. *Holbrook v. Zinc Co.*, 57 N. Y. 616. The purchaser need not inquire further to ascertain whether there is any infirmity in the title of the person named as owner in the certificate. It is wholly within the power of the agents of the corporation to ascertain whether the person to whom a certificate has been issued has the legal title to the shares, when such title is only transferable upon the books of the corporation; and it is their duty towards every person who may become a purchaser upon the faith of a certificate to exercise due diligence in this behalf. *Telegraph Co. v. Davenport*, 97 U. S. 369. The purchaser may reasonably repose upon the belief that this duty has been faithfully discharged. Hence it follows that if by their negligence, or even by their malfeasance, a certificate has been issued by agents of the corporation while acting within the general scope of their powers, the purchaser has a right to rely upon the truth of the recitals, and to treat them as the formal representation of the corporation, made by those who are entitled to act and speak for it in the particular transaction. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 180; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Hall v. Rose Hill R. Co.*, 70 Ill. 673; *Shaw v. Port Philip & Colonial Min. Co.*, 50 Law T. R. (N. S.) 685. Those who have acted

upon the faith of such an affirmation may insist that it shall not be retracted to their prejudice by the party responsible for it, because it would be a breach of good faith to do so. The rule is so familiar that it is unnecessary to refer to the authorities at large. A pertinent illustration is found in the case of *Machinists' Nat. Bank v. Field*, 126 Mass. 345, where shares of a corporation had been purchased by a defendant, who received a certificate issued by the corporation upon the surrender of an outstanding one upon which the assignment and power of attorney of the holder had been forged; and it was held that the defendant could not be ordered to return his certificate, because he purchased the shares in good faith, and for a valuable consideration, and the certificate issued to him before he parted with his money was, as against the corporation, conclusive evidence of his title.

Upon the facts here, it would be plain that the complainant could not be heard to deny that Gray was the owner of the shares bought by the defendants, if the latter had acquired title from or through Gray. But an estoppel *in pais* only inures to the benefit of a party who can properly assert that the representation or conduct by which he has been misled was the direct and legitimate cause of his misfortune. The affirmation of the spurious certificate that Gray was the owner of the shares was not the proximate cause of any loss or injury to the defendants. Without the supervening circumstance of a purchase from Gray, it would not have prejudiced them. The consequences of a purchase which could not have been consummated without the forgery or fraud of the person who prepared the spurious assignment and power of attorney—an act for which the complainant is not responsible—cannot be attributed to the complainant. If the defendants could not maintain an action against the complainant to recover damages for their loss, they cannot rely upon an estoppel *in pais* as a defense to the cause of action. *Swan v. North British Co.*, 7 Hurl. & N. 603; *S. C.* 2 Hurl. & C. 175; *McMaster v. Insurance Co.*, 55 N. Y. 222.

Although the defendants cannot rely upon an estoppel solely by reason of the purchase of the spurious certificate, it remains to consider whether the complainant is not estopped nevertheless by reason of the transactions between the parties subsequent to the purchase. At the time when the defendants presented the spurious certificate to the officers of the complainant to have it surrendered, and to have the shares transferred to them on the books of the complainant, Fullerton was in the employ of the complainant. If the agents of the complainant had exercised due care to ascertain whether defendants were entitled to be treated as stockholders, they might or might not have succeeded in discovering the crime of Fullerton, and the deception in which they had negligently participated. However this might have been, when they were informed that the defendants had purchased a certificate to which they had given currency, they were put upon in-

quiry to ascertain whether it was a genuine one. The means of knowledge were within their reach, and were not available to the defendant; and it was their duty to ascertain the truth, and promptly communicate it to the defendants, in order that the latter might not be further prejudiced. The defendants were justified in assuming that this duty would be fulfilled. When the complainant's officers, after waiting a reasonable time for investigation, issued the new certificate, they not only reaffirmed the authenticity of the surrendered certificate, but recognized the defendant's title to the shares, and thereby authorized defendants to repose, without further inquiry, upon the validity of the title they had acquired. Fullerton did not abscond for several weeks after the new certificate had been delivered to the defendants. During this time he was within reach of process, and the defendants had the means of coercing restitution by civil and criminal proceedings against him. It is not to be doubted that they would have followed the ordinary incentives to retrieve their loss, and it cannot be said that the use of the means within their power would have been unavailing. When they were informed that the certificate they had purchased was a forgery or a fraud, the criminal had escaped, and they had lost the opportunity of seeking restitution by the pursuit of the swindler. It is not essential to an estoppel *in pais* that the person who has been misled by the conduct or declarations of another shall have taken any affirmative action in reliance upon the conduct or declaration; it suffices if he has been led to omit what he would have otherwise done, and might have done effectively, to protect himself. This has been decided in many adjudged cases, but those only will be referred to in which the estoppel was placed upon the ground that the person who had relied upon the conduct of another by doing so had lost the opportunity to institute civil or criminal proceedings against the original author of the wrong.

In *Knights v. Wiffen*, L. R. 5 Q. B. 660, a person had purchased a quantity of barley which was in the possession of the defendant from one who had no title to it, and upon the purchase received a delivery order directed to the defendant. Upon being shown the delivery order the defendant said it was all right. The vendor became a bankrupt before the delivery of the barley. It was held that although the purchaser had paid for the barley before showing the delivery order to the defendant, the defendant was estopped from setting up title to the barley, because had it not been for his recognition of the order the purchaser might have resorted to his vendor before the latter's bankruptcy. BLACKBURN, J., said: "Very likely he might not have derived much benefit if he had done so, but he had a right to do it."

In *Casco Bank v. Keene*, 53 Me. 103, the plaintiff held a note purporting to have been made by the defendant. Hearing that the note was a forgery, he took it to the defendant, who admitted it to be genuine. The plaintiff refrained from any attempt to secure payment of the person from whom he got the note until it was too late to pursue him

successfully. It was held that if the plaintiff, relying upon the admission of the defendant, was induced to refrain from obtaining security by the arrest of the one from whom the note was obtained, or by attachment of his property, the defendant would be estopped from showing the note to be a forgery.

In *Continental Nat. Bank v. Bank of Com.*, 50 N. Y. 575, a check purporting to be certified by the teller of a bank was presented to the bank, and the authenticity of the certificate was admitted. The owner of the check had advanced the money on it shortly before it was presented at the bank, and before the certification was discovered to be a forgery the person who had received the money on the check had absconded. It was held to be too late for the bank to retract the admission that the certificate was genuine. FOLGER, J., delivering the opinion of the court, said: "Arrest and detention of the swindler is a powerful means in coercing restoration."

In *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498, the plaintiff in a suit upon a note relied upon an estoppel founded upon the representation of the defendant, who was an indorser of the genuineness of his signature, the representation having been made after the plaintiff had discounted the note. A prior indorser, who had procured the note to be discounted, left the state shortly after the defendant made the representation, and before the maturity of the note. It was held that the defendant was estopped from denying the genuineness of his signature, and that it was immaterial whether the plaintiff's actual damage in relying upon the representation was more or less, but that it was sufficient that plaintiff had lost an opportunity to proceed against the prior indorser.

These cases are all quoted with approval in *Leather Manuf'rs' Bank v. Morgan*, 6 Sup. Ct. Rep. 657, (U. S. Sup. Ct., October term, 1885.) That was a suit brought against a bank by a depositor to recover the amount of certain altered checks of the plaintiff. The alterations had been made by a clerk of the plaintiff, who obtained the money on the checks. The checks were charged to the plaintiff by the bank in the plaintiff's pass-book, from time to time, as they were paid. HARLAN, J., delivering the opinion of the court, says:

"If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by the attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. As the right to seek and compel restoration and payment from the person committing the forgery was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it."

The case of *Voorhis v. Olmstead*, 66 N. Y. 113, is apposite. In that case a corporation made a loan upon the faith of a pledge of certain

cotton by a person to whom it did not belong, who gave an order upon the warehouseman with whom it was stored. Subsequently, the warehouseman, with the consent of the true owner, gave to the corporation an ordinary warehouse receipt for the cotton. The court held that the true owner, having consented to the issuance of the receipt by the warehouseman, should be held to have assented to the pledge; that the corporation had a right to repose upon the receipt as evidence of the pledgor's title; and that its position was altered by relying on the receipt, because if it had not been given the corporation might have resorted to process for the recovery of its loan; and that the true owner was estopped from claiming title to the cotton.

These authorities justify the conclusion that, notwithstanding the defendants had already parted with their money, and had no legal redress against the complainants at the time they presented the spurious certificate for surrender, they may insist upon an estoppel, because their situation was altered by the act of the complainants in recognizing the validity of the certificate, and in consequence they were induced to forego the remedy which they could otherwise have adopted to save themselves from loss.

The bill is dismissed.

DAVIS and others *v.* DAVIS and others.

(*Circuit Court, D. Massachusetts.* May 5, 1886.)

1. TRADE-MARKS—INFRINGEMENT.

Soap packed in a box, with alternate red and yellow wrappers, so as to produce a representation of a trade-mark of the same combination of colors, is not an infringement of that trade-mark.

2. SAME—WHAT WILL BE PROTECTED.

A peculiar method of arranging soap in a box is not a trade-mark which can be legally registered.

In Equity. Motion for preliminary injunction.

W. B. Dorse and *E. B. Hale*, for complainants.

T. L. Wakefield, for defendants.

CARPENTER, J. This bill is brought to enjoin certain alleged infringements of the trade-mark of the complainants, registered June 2, 1885, and numbered 12,279. It appears that the trade-mark of the complainants, and also the alleged infringements thereof, are used in commerce with the Dominion of Canada. The trade-mark is described as follows in the statement annexed to the certificate of registry:

"Our trade-mark consists of a label bearing a representation of the device or design produced by the means and arrangement used by us in packing our cakes or bars of soap in boxes. We fold each cake or bar of soap in either a

red or a yellow wrapper, and pack the cakes or bars thus folded in a box, so that the red and yellow wrappers alternate. * * * As the label is a reproduction of the appearance which the soap presents when packed, as described, in a box, it is obvious that bars or cakes of soap simply wrapped and arranged in a box, as described, is one method of producing our trade-mark, * * * the essential feature of which is the device produced by the combination and alternate arrangement of red and yellow spaces, substantially as described."

This trade-mark, although, in the words of the statement, it "consists of a label," is not attached in any way to the soap sold by complainants. In practice the label is made of the same size as the box of soap, measuring on the inside, and is placed in the box on the upper layer of bars of soap, and is by the retail tradesman taken out, and used as a show-card.

The complainants allege that the respondents infringe this trade-mark in two ways: *First*, they give to their customers a shallow box containing cakes of soap of the same length and breadth as those sold by them, but much thinner, and inclosed in red and yellow wrappers, and arranged alternately by colors, as in the drawing of the trade-mark. This shallow box is exposed to view by the retail tradesman, and serves the purpose of a show-card advertisement. The trade-mark of the complainants, therefore, is a representation, or, if the word may be allowed, a picture, of the top of an open box of soap. It seems entirely clear to me that such a trade-mark cannot be infringed by the use of a real box of soap, of whatever size or shape, or whatever may be the color or arrangement of the wrappers. It seems to me to be impossible to say that any physical object can be, in the nature of things, a colorable imitation of a picture or representation of that object. Still further, it is to be observed that there is a very great difference in appearance between a box of soap, and a printed label representing the upper layer of soap therein contained. The most careless observer could not confound one with the other. I therefore conclude that there is no infringement by the use of the advertising box, unless, indeed, it be an infringement of the rights of the complainants to sell soap wrapped in red and yellow wrappers, arranged alternately in the box in which it is packed.

But the complainants claim, in the second place, that their trade-mark is infringed by the sale of soap wrapped and arranged in boxes in the same manner used by them. Undoubtedly the terms of the statement are broad enough to cover the boxes of soap sold by respondents. The statement expressly says that "bars or cakes of soap simply wrapped and arranged in a box, as described, is one method of producing our trade-mark." But I am of opinion that the registration, in so far as it can be interpreted to cover the sale of boxes of soap, is entirely void, for the reason that the object or thing thus included in the description is not such a thing as can lawfully be registered as a trade-mark. A trade-mark is some arbitrary or representative device attached to or sold with merchandise and serving to

designate the origin or manufacture of that merchandise. I do not think that the merchandise itself, or any method of arranging the various packages, can be registered as a trade-mark. In the very nature of the case, as it seems to me, the trade-mark must be something other than, and separate from, the merchandise. It is not, of course, claimed that the colors used in the wrappers can be in themselves the subject of a trade-mark registration; nor is it claimed that the wrappers themselves constitute the trade-mark. The claim is that the trade-mark consists in the arrangement of the colors in the wrappers. This seems to me to be no less than a patent for an idea, under the guise of the registration of a trade-mark. I do not think that, in any possible view, the claim can be sustained.

There is evidence, also, which makes it most probable that the method of packing soap in alternate red and yellow wrappers was adopted by B. T. Babbitt, of New York, at about the same time it was adopted by the complainants. Taking that view of the evidence which is most favorable for the complainants, it appears that for about four years before their application for registration Babbitt had used the alleged trade-mark without objection or interference. The complainants, indeed, produce samples of the boxes of soap sold by themselves and by Babbitt, and they point out that the colors used by Babbitt are of widely different quality and shade from those used by themselves. Undoubtedly the colors used by Babbitt are pale and dull, and those used by complainants are strong and bright. But Babbitt uses red and yellow, and the statement of the trade-mark specifies no particular shade or quality of color. It would be, I think, difficult to say on this evidence that complainants had the exclusive right to use their alleged trade-mark at the time they made application for registration.

The motion for preliminary injunction will be denied.

PRATT MANUF'G CO. v. ASTRAL REFINING CO., Limited, and others.

(Circuit Court, W. D. Pennsylvania. April 30, 1886.)

1. TRADE-MARK—"ASTRAL OIL."

The appropriation of the word "Astral," in a combination of words constituting a trade-mark, does not preclude its use in all other combinations formed for the like purpose. *Held*, therefore, that the plaintiff's trade-mark, "Pratt's Astral Oil," applied to refined petroleum, was not infringed by the use of the words "Standard White Astral Oil" to designate the defendants' refined petroleum.

2. SAME—KNOWN USE OF WORD.

An oil-burning lamp called the "Astral Lamp" having been long well known, and in common use, *semble*, that the word "Astral" was without the range of lawful appropriation as a trade-mark for refined petroleum.

8. SAME—RELIEF REFUSED.

Relief will not be granted against the use of a brand which points unequivocally to origin, and, except in the common use of the words "Astral Oil," so differs from the plaintiff's brand that purchasers will not mistake the one for the other.

In Equity.

C. Heydrick, for complainant.

J. W. Lee and Martin Carey, for respondents.

ACHESON, J. This is a suit by the Pratt Manufacturing Company, a corporation of the state of New York, against the Astral Refining Company, Limited, a partnership association formed under the laws of the state of Pennsylvania, and the managers thereof, to restrain the defendants from using the words "Astral Oil," either alone or in connection with other words, as a brand or mark upon packages of refined petroleum, and from the use of the word "Astral" as part of their partnership name; and also to compel the defendants to account for the profits on refined petroleum so branded, sold by them; the plaintiff alleging such use of said words or word to be an infringement of its trade-mark.

It appears that Charles Pratt, who carried on the business of refining petroleum in the state of New York, in the year 1869 adopted as a trade-mark in his business the words "Pratt's Astral Oil," which he continued so to use until the year 1874, when he transferred his business and his right and title to said trade-mark to the plaintiff company, which has since continued the said business, and the use therein of said trade-mark,—the plaintiff having, on October 25, 1881, obtained registration of said trade-mark agreeably to the provisions of the act of congress of March 3, 1881. The bill alleges that the plaintiff "has, at great expense, introduced the particular grade and quality of refined petroleum manufactured by it into the market, not only of this country, but of foreign countries, under the name 'Pratt's Astral Oil,' by which name your orator's product long since became and now is widely known." The evidence, however, shows that in actual practice the plaintiff does not designate its refined petroleum by the words "Pratt's Astral Oil" simply, but by a brand of this character, viz.: Within a circular border, and following the upper arc of the circle, are the words "Pratt's Astral Oil;" within and following the lower arc of the circle is the word "New York;" above "New York" are the figures and word "46 Broadway;" and in the center of the circle is a peculiar device or design, beneath which is the word "Trade-mark."

The refinery of the defendant company, which is situated on the Allegheny Valley Railroad, near Oil City, Pennsylvania, was built, and the name "Astral" given to it, about January or February, 1881. While the works were in course of erection, the railroad company established a station at that point, and called it Astral; and on April 28,

1884, a post-office of the same name was established there. About April 1, 1884, the limited partnership defendant was organized, and purchased said works, and has since operated them. It is satisfactorily shown that neither the parties who originally applied the word "Astral" to these works, nor the defendants when they adopted it as part of their partnership name, had any knowledge whatever that the word was used by the plaintiff. Upon the heads of their petroleum barrels the defendants' brand, in circular form, the words "The Astral Refining Company, Limited, Oil City, Pa.;" and in the center of such circle are the words, "Standard White Astral Oil." This is the entire brand, and the whole is in large and conspicuous letters.

Such being the material facts of the case, is the plaintiff entitled to the relief sought? It will be observed that the plaintiff in effect claims an exclusive property in the use of the words "Astral Oil," as applied to refined petroleum; and also in the use of the word "Astral," as applied to the business of refining petroleum. Can this pretension be sustained? I think not. In the first place, I strongly incline to the opinion that the word "Astral" was without the range of lawful appropriation as a trade-mark for refined petroleum by reason of the fact that long before it was employed by Charles Pratt the appellation had been given to an oil-burning lamp well known and in common use. Now, very naturally, the public might associate the words "Astral Oil" with the "Astral Lamp," and thus the exclusive use of those words as a trade-mark would have a tendency to give the plaintiff an unfair and hurtful monopoly in contravention of that rule of law which forbids the use of anything as a trade-mark which would destroy competition. *Canal Co. v. Clark*, 13 Wall. 323. Then, in the second place, the appropriation of the word "Astral" in one combination of words does not preclude its use in all other combinations. Such was the determination of the supreme court of Pennsylvania in respect to the word "Samaritan," as applied to compound medicines. *Desmond's Appeal*, 13 Wkly. Notes Cas. 303.

The plaintiff's trade-mark consists, not of the word "Astral" alone, nor yet of the two words "Astral Oil." The prefix "Pratt's" is the distinguishing word in the plaintiff's combination, and, in truth, is indispensable; for, according to the averment of the bill, it is by the name "Pratt's Astral Oil" that the plaintiff's product is known in the markets of the world. Is it credible that purchasers possessing ordinary intelligence, and observing reasonable care, would confound "Standard White Astral Oil" with "Pratt's Astral Oil"? Moreover, the plaintiff's packages of refined petroleum are designated by a peculiar brand of which the said name forms a part. Now, the brand used by the defendants is not in imitation of the plaintiff's, but essentially differs therefrom. Indeed, it seems to me to be quite impossible that any purchaser would mistake one for the other. The brand of the defendant company, so far from tending to mislead buyers,

points directly and unequivocally to the origin of the contents of the packages.

There is not a particle of proof that the defendants have attempted to practice deception upon the public, or to perpetrate any fraud upon the plaintiff; but, on the contrary, the defendants' entire good faith is affirmatively shown. There is, then, no ground whatever for granting relief to the plaintiff. That the bill must be dismissed, is a conclusion in consonance with well-considered and authoritative decisions. *Desmond's Appeal*, *supra*; *Gilman v. Hunnewell*, 122 Mass. 139; *Manufacturing Co. v. Trainer*, 101 U. S. 51.

Let a decree be drawn dismissing the bill, with costs.

RICHARDSON v. GRANT Co.

(Circuit Court, D. Indiana. December 28, 1883.)

1. MUNICIPAL CORPORATIONS — ILLEGAL CONTRACTS — LIABILITY ON QUANTUM MERUIT.

Municipal or public corporations are not liable, on the *quantum meruit*, for the value of materials furnished under illegal or forbidden contracts, when the municipality cannot choose whether or not it will retain or reject the benefit of such work or materials.

2. SAME—COUNTY BOARDS IN INDIANA—CONTRACTS FOR CONSTRUCTION OF PUBLIC BUILDINGS.

Contracts for the construction of court-houses and other public structures, to cost more than \$500, unless let to the lowest bidder upon plans and specifications theretofore adopted, being forbidden, the county will not be held liable for the value of a court-house constructed, upon public ground, under a contract made in disregard of the statute, notwithstanding the use of the building by the county.

3. SAME—ALTERATION OF PLANS IN COURSE OF CONSTRUCTION.

The statute which forbids contracts for the construction of county buildings to cost more than \$500, unless made with the lowest bidder according to plans and specifications, applies to contracts for parts of such structures; and if, in the course of construction under a legally-made contract, any alteration or addition to the plans, exceeding \$500 in cost, is made without specifications and bids, the county will not be liable for the price or value thereof.

At Law.

McDonald, Butler & Mason, for plaintiff.

Harrison, Miller & Elam, for defendant.

Woods, J. The complaint charges an indebtedness of the defendant to the plaintiff in the sum of \$24,000, for materials furnished, work and labor done, skill bestowed, and money paid out by the plaintiff, at the special instance of the defendant's board of commissioners, in the construction of a court-house for the defendant. A proper bill of particulars is filed, and it is averred that the board of commissioners for the county has received, and is in the enjoyment of, the said work and labor and materials. The fourth paragraph of answer

is to the effect that no plans and specifications for the work were ever made and adopted by the board of commissioners, and filed as required by law, and no advertisement made for bids for doing the work and furnishing the materials; nor were any bids presented to, or received by, the board. To this answer the plaintiff has demurred for want of facts stated sufficient to constitute a good defense to the action.

By the first section of an act of the Indiana legislature, which took effect August 24, 1875, it is provided that "it shall not be lawful for any board of county commissioners in this state to make any contract for the construction of any court-house, jail, or any other county or township building or monument, until plans and specifications have been adopted by such board, and * * * deposited in the office of the auditor of such county, and open to the inspection of the people of such county. All contracts attempted to be made in violation of the foregoing provisions shall be null and void." The next section provides that when such plans and specifications shall have been adopted and filed, the board shall not contract for or let the proposed work "until it has advertised such letting, and requested bids for the same," in a manner prescribed, "with a reference to such plans and specifications: provided, that the provisions of this act shall not apply to buildings when the cost of the same shall not exceed five hundred dollars." The next section requires the board to let the contract to the lowest bidder, and to require of him bond and security for the faithful performance of the work according to the plans and specifications so deposited. Rev. St. 1881, §§ 4243-4245.

It is conceded, as I understand, that under these statutory provisions no special contract for the work done by the plaintiff, not made in substantial conformity with the statute, could be enforced; but the plaintiff insists that, upon the averment that the board of commissioners, acting for the county, had received and was in the enjoyment of the work done and materials furnished by him, he is entitled, upon the common count, to recover the *quantum meruit*. Neither upon authority, nor in reason, as it seems to me, can this be so. In the common count it is necessary to aver, and the plaintiff has averred, that the work was done at the special request of the defendant; that is to say, of its board of commissioners. This statute, however, expressly forbids such request or assent on the part of the board. Of this the plaintiff was bound to take knowledge, and consequently is placed in the attitude of one who has done a voluntary service, for which he can legally claim no recompense.

The common count or claim to recover a *quantum meruit* must rest upon an implied promise or liability; but where a municipal body is required to make certain contracts in a prescribed way, and forbidden to make them in any other way, there is left no room for an implied obligation. In this case the statute, in express terms, declares any attempt to make a contract, without the plans and speci-

fications required, null and void; but without this, the effect of the express prohibitions of the act would doubtless be, in this respect, the same. The board being forbidden to make such contracts, it would seem could not, by any act of ratification, create an obligation upon the county. Private corporations may doubtless incur liability by reason of contracts made in excess of their powers, and even public or municipal corporations may be liable in supposable cases for money or property received upon contracts into which they had no power to enter; but in respect to services rendered which cannot be rejected or returned, and in respect to work and labor done and materials furnished in the construction of public buildings, erected on public grounds, there being in the nature of things no choice whether or not there shall be an acceptance or rejection of the work, the rule ought to be, and as I understand is, different. This is certainly so when the liability is sought to be established upon transactions done "in disregard of positive prohibitions." Dill. Mun. Corp. §§ 381-387, and authorities cited.

It follows that the demurrer to the answer should be overruled. So ordered.

(April 24, 1886.)

On Motion for Rehearing.

WOODS, J. A rehearing upon the demurrer is asked; counsel for plaintiff now insisting, notwithstanding the requirements and inhibitions of the statute, that during construction of a court-house or other county building, under a contract made in accordance with the law, changes may be made in the plans and contracts for additional work entered into, though the cost thereof be greater than \$500. I cannot concur with this view. Under such a construction, the law would apply only to contracts for the construction of an entire building, and could be evaded and practically nullified in most cases by making, without plans and specifications, and without advertisement, separate contracts for the different parts of the structure.

Rehearing denied.

v.27f.no.6—32

STANTON v. SHIPLEY.

*(Circuit Court, D. Indiana. April 29, 1886.)*1. **CIRCUIT COURT — JURISDICTION — NON-NEGOTIABLE NOTES — ASSIGNEE AND PAYEE.**

In the United States circuit court an action on a non-negotiable note by an assignee, not averring the citizenship of the payee, must fail for want of jurisdiction.

2. **SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL TOWNSHIP NOTES—NEGOTIABILITY.**

Notes payable from a particular fund, issued by a school township, endowed only with restricted powers for special and purely local purposes of a non-commercial character, are not negotiable by the law-merchant.

3. **SAME—LIABILITY OF SCHOOL TRUSTEES—INDIANA STATUTE.**

Paper in negotiable form, issued by a school trustee, if not void, has only the force of a single obligation.

4. **SAME—LIABILITY, HOW MEASURED.**

The liability declared by the second section of "An act touching the duties of township trustees in certain particulars" (Acts Ind. 1883, p. 114) is measured, not by the sum named in the forbidden contract or writing, but by the amount of the indebtedness evidenced thereby; and the right of action is given, not upon the paper, but to the holder thereof.

5. **SAME—LIABILITY OF BONDSMEN.**

Liability on "official bond" is not the same as personal liability, and does not necessarily include the bondsmen.

6. **SAME—ACTION ON NOTES—PLEADING—CONSIDERATION.**

In an action on notes issued by a school trustee, in violation of the Indiana statute, (Acts 1883, p. 114,) a complaint which does not aver the real consideration or indebtedness for which the notes were made is substantially defective.

At Law.

Claypool & Ketcham, for plaintiff.

James H. Jordan, Adams & Newby, Duncan, Smith & Wilson, Grubbs & Parks, and McDonald, Butler & Mason, for defendants.

WOODS, J. Complaint upon the official bond of Jacob A. Shipley, as trustee of Gregg township, in Morgan county, Indiana; the defendants before the court being the sureties upon that bond. The plaintiff, who claims as assignee by delivery after indorsement in blank by the payee, seeks to charge the defendants with the amount of eight promissory notes alleged to have been made by said trustee in violation of the second section of "An act touching the duties of township trustees in certain particulars," approved March 5, 1883. Acts 1883, p. 114. That section provides "that any township trustee in any county of the state of Indiana, who shall contract any debt in the name or in behalf of any civil or school township of which he may be the trustee, contrary to the provisions of sections one and two of an act approved March 11, 1875, (the same being sections numbered six thousand and six and six thousand and seven of the Revised Statutes of the State of Indiana,) shall be personally liable, and liable on his official bond, to the holder of any contract, or other evidence of such indebtedness, for the amount thereof."

Section 6006, referred to, is to the effect that whenever it becomes

necessary for the trustee of any township to incur any debt or debts aggregating more than the fund on hand to which the debts are chargeable, and the like fund to be derived from taxes assessed for the year, the trustee shall procure from the board of county commissioners an order authorizing him to contract such indebtedness; and in the other section (6007) it is provided that such order shall be granted only upon a petition of the trustee showing the object and proximate amount of the debt or debts to be incurred, and upon proof that notice has been given in a prescribed manner of the pendency of the petition.

The notes in question, except the amounts for which they purport to be given, are all of the same tenor. The one set out in the complaint as Exhibit B reads as follows:

"\$763.50. STATE OF INDIANA, COUNTY OF MORGAN.

"TRUSTEE'S OFFICE, GREGG SCHOOL TOWNSHIP, April 11, 1885.

"This is to certify that there is now due from this township to R. B. Pollard, or order, seven hundred and sixty-three 50-100 dollars for school supplies bought for and received by this township, and payable out of the special school funds for which taxes are now levied, at the First National Bank of Martinsville, Indiana, on the twentieth day of December, 1886, with interest at 8 per cent. per annum, on the amount from date till paid, and attorney's fees. JACOB A. SHIPLEY, School Trustee of Gregg Township.

"P. O. Wilbur, Ind."

To this (and likewise to each of the notes) is appended the following (or similar) certificate:

"This is to certify that Gregg township school warrant of Morgan county, Indiana, dated April 11, 1885, for seven hundred and sixty-three 50-100 dollars, payable to R. B. Pollard, or order, due on or before December 20, 1886, at 1st National Bank, Martinsville, Ind., was given by myself as trustee of said school township for school supplies, which have been received and accepted, and that said warrant was issued according to law, and will be promptly paid when due. The entire indebtedness of said township is less than two per cent. of its assessed valuation.

"JACOB A. SHIPLEY, Trustee of Gregg School Township.

"P. O. Address, Wilbur, Ind.

"Dated at Wilbur, Ind., April 17, 1885."

It may be noted that each certificate bears a date subsequent to the date of the note to which it is attached.

The complaint shows that each of these obligations was issued in violation of the statutory provisions already referred to, but contains no averment in respect to the real consideration or indebtedness for which they were made.

The first question in order is one of jurisdiction. The plaintiff is shown to be a citizen of New York, and the defendants all to be citizens of Indiana; but the citizenship of Pollard, the payee of the paper, is not averred, and counsel for the defendants, asserting that the notes are not negotiable by the law-merchant, insist that the

plaintiff can come into this court only by showing that Pollard might also sue them here. By the act of congress no circuit or district court can "have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant, and bills of exchange."

If the plaintiff's suit be regarded as founded upon the notes set out in the complaint, and his counsel have insisted that the action is, in a sense, upon the notes, I think there is a want of jurisdiction. That the notes are not negotiable by the law-merchant I think clear, for two reasons: *First*, each purports to be payable out of a particular fund; *second*, they purport to be the notes of a school township, a municipal corporation existing under public laws, and endowed only with restricted powers, granted for special and purely local purposes of a non-commercial character. Such bodies, as every one must take notice, have no power, without express or clearly-implied grant, to make negotiable paper; and, if their officers or agents attempt to put out corporate paper in commercial form, it will be deemed void, or at most a simple obligation of which the true consideration may be shown against any holder or purchaser. *Police Jury v. Britton*, 15 Wall. 566; *Mayor, etc., v. Ray*, 19 Wall. 468; *Reeve School Tp. v. Dodson*, 98 Ind. 499; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464; S. C. 2 N. E. Rep. 194; *Middleton v. Greeson*, 5 N. E. Rep. 755, (Ind. Sup. Ct.)

There can be no doubt, I think, that a township trustee, in Indiana, within the scope of his powers in respect to township affairs, may execute notes which shall be binding upon his township. It was explicitly so held in *Johnson School Tp. v. Citizens' Bank*, 81 Ind. 515, following *Sheffield School Tp. v. Andress*, 56 Ind. 157, and is distinctly implied in earlier and later decisions; but that he cannot make obligations which in the hands of innocent purchasers will not be subject to just defenses seems to have been put beyond dispute; some of the later cases even containing *dicta* to the effect that a trustee cannot execute a writing which will be, in itself, *prima facie* evidence of township liability.

Counsel, however, have argued that this rule has been modified by the act of 1883, *supra*, which, they insist, was designed, upon considerations of public policy, to give greater commercial credit to township obligations; especially to obligations like these in suit, which are made (as is asserted) absolutely payable to their full amount, by the trustees who issue them in disregard of the law, and by their bondsmen, as if put forth by them as their individual obligations.

If this view be adopted, then the liability of the defendants must be strictly according to the terms of the notes sued on, disregarding only the clause in respect to payment out of public funds or taxes. But while this might make the paper commercially negotia-

ble, and eliminate the question of jurisdiction, it would be fatal to the action on the merits, because by their terms the notes in suit are not yet due.

This construction of the statute, however, does not meet my approval. It would lead to the conclusion—indeed, it means—that an original holder or payee of such paper, though made without consideration, or made for fraudulent purposes, to which he was a party, may recover the amount thereof, not only from the trustee, who may or may not have intended a wrong, but from his bondsmen, innocent of any wrongful act or purpose. So interpreted the statute would be highly penal, and, by the rule of strict construction, I should be inclined to hold that liability in such cases does not attach to the sureties on such bonds at all. The language of the act is “that any township trustee * * * shall be personally liable, and liable on his official bond.” The bondsmen, if included, are included only by implication, and the implication by no means imperative or necessary. A personal liability and a liability on an official bond are different, and the remedies to be had in a suit upon one are different from those available in an action upon the other; and consequently the provision for liability on the bond is not meaningless or useless, though the sureties be not included. But, in my judgment, the liability declared by this statute is measured, not by the sum named in the forbidden contract or writing, but by the amount of the indebtedness evidenced thereby. By its terms the act applies to transactions in which a trustee “shall contract any debt;” and he is made liable, to the holder of the “evidence of such indebtedness, for the amount thereof.” The indebtedness, therefore,—the value of the consideration received by the township, or, possibly, of that received by the trustee for the township,—is the measure of liability. The right of action is given, not upon the paper, but to the holder of it. It would seem to follow from this, and, as I understand, it has been conceded in argument, that the right of action is transferable with the paper to successive holders; but I think it clear that an assignee acquires no different or better right, as against the trustee or his bondsmen, than that of the first holder. And while, in this view, the suit is not, in a strict sense, founded on the contracts expressed in the notes, it is, perhaps, so far incident thereto as to bring the case within the rule that the assignee of a contract cannot sue in a federal court when his assignor could not.

It may be, however, that the plaintiff's right of action, if any he has, is purely statutory, and not to be regarded in any sense as “founded on contract;” and if this be so, there is apparently no valid objection to the court's jurisdiction in the case.

But, whatever be the right view of this subject, it is proper to decide the further question, fully argued by counsel, whether or not the complaint shows a cause of action upon the merits; because there are other cases pending, which were submitted and argued at the same

time with this, from which, by amendment of the complaints, the question of jurisdiction may be eliminated.

Little need be added on this point. The conclusion has already been declared that the recovery in such a case must be for the amount of indebtedness for which the notes were given. The complaint shows that the notes were issued in violation of law. The defendants are not party to them, nor bound—conclusively, at least—by them. They are not, in the sense of the Indiana Code, the foundation of the action, and need not have been made exhibits in the complaint. It may be that they constitute, even as against the defendants, *prima facie* evidence of the indebtedness—that is to say, of the amount or value of the consideration—for which the trustee issued them; but, in my judgment, the copies set out in the complaint do not supply the want of direct averment in respect to that indebtedness. Whether or not it is necessary to show an indebtedness for which the township became legally bound, or only the value of the consideration upon which the notes were executed, need not now be decided. One or the other must be shown.

Notwithstanding the illegality of the notes, and their consequent want of binding force upon the municipality, it may be that the township received, and has retained and used, the consideration in such way as to be liable in an action for the reasonable value; and, if so, the case is one in which an actual indebtedness may be shown. Or it may be that the trustee received the consideration, but converted it to individual uses, the township getting no benefit; and in such case a valid indebtedness, of course, could not be alleged; and this, regardless of inquiry whether the payee of the notes, the vendor of the goods for which they purport to have been given, acted in good or bad faith. If he acted in good faith, selling the goods at a fair price, and supposing that the township would get them, it would seem not unreasonable that he should have his remedy under the statute. But suppose he acted fraudulently? Leaving such questions for consideration when it shall be necessary to decide them, it is enough now that, in any view, the present complaint is not sufficient.

Demurrer sustained.

RIDDLE v. FIRST NAT. BANK OF BUTLER, PA., with notice to Campbell, Receiver of said Bank.

(Circuit Court, W. D. Pennsylvania. April 21, 1886.)

1. BANKS AND BANKING—NATIONAL BANKS—CERTIFICATES OF DEPOSIT—POST-NOTES.

Certificates of deposit in the ordinary form, issued by a national bank to depositors, and payable to order, are not post-notes, within the prohibition of section 5183, Rev. St.

2. SAME—CERTIFICATE NOT DUE TILL DEMAND.

A certificate of deposit, payable to the order of the depositor on the return of the certificate, is not due or payable until demand made and return of the certificate.

3. SAME—STATUTE OF LIMITATIONS—RECEIVER.

The statute of limitations is not set in motion against a certificate of deposit by the appointment of a receiver for the bank which issued it.¹

4. SAME—ASSETS—TRUST FUND.

The assets of a national bank in the hands of a receiver constitute a trust fund, in behalf of all creditors having claims thereon valid and in full life when the receiver was appointed, which the statute of limitations does not touch or affect.

5. SAME—PENNSYLVANIA STATUTE.

The Pennsylvania act of April 25, 1850, which takes out of the operation of the statute of limitations suits against a corporation which may have suspended business, etc., applies to a suit brought against a national bank in the hands of a receiver.

6. SAME—COMPOSITION OF CLAIMS.

Under the findings of fact, *held*, that the certificates in suit were not extinguished or affected by a composition of certain claims entered into between the plaintiff and the receiver of the bank under the direction of the controller of the currency.

7. SAME—DIVIDENDS—INTEREST.

While the plaintiff will be entitled to a dividend only upon the basis of the debt, and interest as of the date when the bank suspended, in this suit against the bank interest should be computed to the date of judgment.

In pursuance of a written stipulation, this case was tried by the court without the intervention of a jury. The following facts are therefore found by the court.

(1) The First National Bank of Butler, Pennsylvania, (the defendant,) issued, on the several dates thereof, and to the respective payees therein named, for deposits of money by them made, certificates of deposit, of which the following are copies:

A.

"\$64.60. FIRST NATIONAL BANK OF BUTLER, PA., August 12, 1878.

"Mrs. Annie Riddle has deposited in this bank sixty-four 60-100 dollars, payable to her order on return of this certificate properly indorsed, 12 months after date, with interest at five per centum per annum. If not presented at maturity, it will be considered as a renewal for same term, at same rate.

"ALEX. MITCHELL, Cashier."

B.

"THE FIRST NATIONAL BANK OF BUTLER, PA., January 8, 1879.

"W. H. H. Riddle, Esq., has deposited in this bank five hundred dollars, payable to the order of himself on return of this certificate properly indorsed.

"\$500.

ALEX. MITCHELL, Cashier."

¹See note at end of case.

C.

"\$1,253.86. FIRST NATIONAL BANK BUTLER, PA., February 19, 1878.

"Samuel L. Riddle, Esq., has deposited in this bank twelve hundred and fifty-eight and 36-100 dollars, payable to his order, on return of this certificate properly indorsed, six months after date, with interest at five per cent. per annum. If not presented at maturity, it will be considered as a renewal for same term, at same rate.

ALEX. MITCHELL, Cashier."

(Indorsed:

"NOVEMBER 30, 1878.

"R'd of Alex. Mitchell, cashier, forty-eight 40-100 dollars, int. in full on the within to this date.

SAM'L L. RIDDLE,

"Per W. H. H. RIDDLE.)"

D.

"\$318.23. FIRST NATIONAL BANK OF BUTLER, PA., March 21, 1879.

"Samuel L. Riddle, Esq., has deposited in this bank three hundred and eighteen 23-100 dollars, payable to his order, on return of this certificate properly indorsed, 12 months after date, with interest at five per cent. per annum. If not presented at maturity, it will be considered as a renewal for same term, at same rate.

ALEX. MITCHELL, Cashier."

(2) Mrs. Annie Riddle and W. H. H. Riddle duly indorsed their above certificates (designated as *A* and *B*) to the said Samuel L. Riddle, the plaintiff.

(3) For infractions of the laws governing national banking associations a receiver of said bank was appointed by the comptroller of the currency in the month of July, 1879, and the bank has since remained in the hands of such receiver, in the course of liquidation.

(4) To No. 9, May term, 1880, of this court, the receiver brought a suit in equity against the said Samuel L. Riddle to recover back certain payments made by the bank to him on account of indebtedness (other than that involved in this suit) from the bank to him; it being alleged that such payments were made after an act of insolvency on the part of the bank, and in contemplation thereof, and with a view of giving him an unlawful preference over other creditors, contrary to section 5242, Rev. St.

(5) To No. 10, November term, 1881, of this court, the receiver brought a suit in equity against W. H. H. Riddle, and others, directors of said bank, to charge them for alleged violations of the national banking laws, and particularly with infractions of sections 5199, 5200, 5204, Rev. St.

(6) On January 31, 1885, the following proposition of compromise, signed by the parties therein named, was submitted by them to the receiver of the bank, viz:

"BUTLER, PENNA., January 31, 1885.

"*Genl. John N. Purviance, Receiver of the First National Bank of Butler, Penna.*—SIR: It is hereby proposed on behalf of Charles Duffy, Charles McCandless, W. H. H. Riddle, Louis Stein, Thomas Stehley, Sr., Samuel L. Riddle, Thomas Robinson, and John M. Greer to settle and compromise in full all claims of the First National Bank of Butler against each and all of the above-named parties upon the following basis, viz.: The said Duffy *et al.*, within five days from the date of receipt by the receiver of said bank of notification from the comptroller of the currency of approval of this proposition, to pay in cash to the receiver of said bank the sum of twelve thousand (\$12,000) dollars; and the said receiver shall thereupon discontinue and mark settled the two equity suits now pending in the United States circuit court for the Western district of Penna., one against the bank directors and the other against Samuel L. Riddle, and the suit against Charles Duffy in the U. S. court, the receiver paying out of the fund of twelve thousand dollars aforesaid all costs of said suits taxable as costs on the records thereof; and shall

further cancel and annul, as against Charles McCandless, all and every form of indebtedness held by the bank against said McCandless; the bank, however, retaining all securities by him transferred to the bank, and his deposit therein at the time of the failure; and shall, further, either cancel and annul all the claims, and the securities held therefor, of the bank against Thomas Robinson and John M. Greer, respectively, or shall assign and transfer the said claims and securities to such person as the said Robinson and Greer may request and direct."

This proposition was approved by the receiver, and on March 6, 1885, he was authorized by the comptroller of the currency to accept the same; the settlement to be made under an order of the court, pursuant to section 5234, Rev. St. On March 10, 1885, by an order of this court, made at No. 20, May term, 1885, the proposed settlement was approved and confirmed, and it was accordingly carried into full effect.

(7) By reason of a suggestion made by the receiver, (Gen. Purviance,) soon after his appointment, to the plaintiff or his agent, that pending the above-mentioned equity suits the plaintiff should withhold proof of his said certificates, they were not proved against the assets of the bank in the hands of the receiver. The liability of the bank thereon, however, was never questioned by the receiver; and when the above proposition of compromise was presented to and accepted by him it was agreed between him and the plaintiff that he, the receiver, (Gen. Purviance,) in receipting for the \$12,000 would accept the certificates here in suit as the equivalent of \$1,600, that sum being the estimated dividend to which they would be entitled; and accordingly, upon that basis, they were actually taken by the receiver, and transmitted by him to the comptroller of the currency. But the comptroller refused to receive them, and insisted that the whole \$12,000 be paid in cash. The certificates were then redelivered by the receiver to the plaintiff's agent, who paid to the receiver the \$1,600 in cash. The plaintiff subsequently offered to prove his certificates, but by order of the comptroller such proof was declined. Thereupon, on February 26, 1886, this action was brought thereon.

(8) When the receiver was appointed, W. H. H. Riddle was indebted to the bank upon the following notes, which passed into the receiver's hands, and have since been held by him, viz.: His note for \$320, dated March 21, 1879, payable in four months after date, to the order of A. Mitchell; his note for \$19.50, dated July 3, 1879, payable 30 days after date, to the order of Riter & Ralston; and the note of L. R. McAboy, for \$225, dated March 22, 1878, and payable in four months after date, with the written guaranty and indorsement of W. H. H. Riddle thereon.

W. S. Purviance, for plaintiff.

T. C. Campbell, for defendant.

ACHESON, J. 1. That the instruments sued on are post-notes, within the prohibition of section 5183, Rev. St., is a proposition to which I cannot assent. They are mere certificates of deposit, of the usual form, issued in the ordinary course of banking business, and are not designed or adapted to circulate as money.

2. A certificate of deposit, payable to the order of the depositor on return of the certificate, is not due or payable until demand made and return of the certificate. *McGough v. Jamison*, 107 Pa. St. 336; Daniel, Neg. Inst. § 1707a. Hence it is plain that the statute of limitations had not commenced to run against any of the certificates in suit at the time of the appointment of the receiver of the defendant

bank. It is, however, contended that immediately thereupon these certificates became payable, and the statute of limitations was set in motion against them. But upon what principle the appointment of a receiver should have that effect is not clear to me. By virtue of such appointment, indeed, all the assets of the bank pass to the receiver, but, in his hands, in behalf of all creditors having claims thereon then valid and in full life, these assets constitute a trust fund which the statute of limitations does not touch or affect, (*Heckert's Appeal*, 24 Pa. St. 482;) and then the bank itself is not dissolved by such appointment, but it remains answerable to creditors, and liable to suit as before, (*Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383.) But, without further discussion of the point, it is sufficient to say that this suit is excluded from the operation of the statute of limitations by virtue of the Pennsylvania act of twenty-fifth April, 1850, which reads thus:

"The provisions of the act passed the twenty-seventh March, 1713, entitled 'An act for the limitation of actions,' shall not hereafter extend to any suit against any corporation or body politic which may have suspended business, or made any transfer or assignment in trust for creditors, or who may have, at the time and after the accruing of the cause of action, in any manner ceased from or suspended the ordinary business for which said corporation was created." 2 Purd. 1067, pl. 24.

A corporation put in the hands of a receiver is clearly within the purview of this act.

3. The settlement recited in the sixth finding of fact did not, in terms, embrace or concern the certificates in suit; nor were these certificates in anywise involved in any of the suits mentioned in the proposition of compromise. They were independent claims, held by the plaintiff against the bank, the validity of which had never been called in question by the bank or its receiver. Now, of a certainty, it was not the intention, either of the plaintiff or of the receiver, that this settlement should impair the certificates, or prejudice the rights of the plaintiff therein. On the contrary, the express understanding between these two was that these certificates should be treated as of the money value of \$1,600, and to that extent used as cash in the stipulated payment. That arrangement was fair enough; but not having been previously communicated by the receiver to the comptroller of the currency, that official was not bound to sanction it. No doubt his refusal to do so was proper. The written proposition, the acceptance of which he had authorized, called for cash, and he was entirely right in insisting upon a strict compliance with its terms. But when the full cash payment was made, and the certificates were returned to the plaintiff, the latter was reinvested with all his original rights under the same. If the comptroller had been acting under a misapprehension as to the scope of the proposed compromise, it was, perhaps, open to him, when his attention was called to these certificates, to withdraw his consent altogether, and, upon a timely appli-

cation to the court, a revocation of the order for the settlement might possibly have been obtained. But this course was not taken, and to the consummated settlement such effect must be given as is consistent with fair dealing. Now, by no just interpretation of the terms of the settlement can it be held to have extinguished or affected these certificates. Under the evidence and findings, it is not to be doubted that they are valid and subsisting claims.

4. The settlement is expressed to be in full of all claims of the bank against W. H. H. Riddle. This would embrace his liability on the notes mentioned in the eighth finding, and such, undoubtedly, was the intention; so that, on this ground, the defense of set-off to certificate *B* fails, even if otherwise it could have prevailed as against the plaintiff.

5. While it is true that the plaintiff will be entitled to a dividend only upon the basis of the debt and interest as of the day when the business of the bank was suspended by order of the comptroller, (*White v. Knox*, 111 U. S. 784, S. C. 4 Sup. Ct. Rep. 686,) still the finding here must include interest to this date, (*Id.*)

Upon the facts found, I am of the opinion that the plaintiff is entitled to recover the amount of his claim; and, accordingly, the court finds in favor of the plaintiff the sum of \$2,751.32. Let judgment for the plaintiff be entered upon the finding of the court.

NOTE.

Where a receipt for money declares that the sum named therein is "due on demand," and is "especially deposited," it is not a promissory note, but a certificate of deposit, and the statute of limitations will not begin to run until demand has been made. *Smiley v. Fry*, (N. Y.) 3 N. E. Rep. 186.

A right to sue a bank upon a general deposit does not accrue, nor the statute of limitations begin to run, until a demand of payment, unless the demand is in some way dispensed with. *Branch v. Dawson*, (Minn.) 23 N. W. Rep. 552.

Semble, the statute of limitations begins to run from the date of a certificate of deposit payable on demand. *Tripp v. Curtenius*, 36 Mich. 494.

BALLIETT, Assignee, etc., v. DEARBORN and another.

(District Court, N. D. New York. May 21, 1886.)

BANKRUPTCY — FRAUDULENT TRANSACTION — EFFECT OF DISCHARGE — CANCELLATION OF JUDGMENT.

In an action for the cancellation of a judgment, or perpetual stay of execution thereon, on the ground that the debtor has been discharged in bankruptcy, if the holder of the judgment was a party to the fraudulent transaction out of which the judgment has arisen, he cannot plead that the judgment, being founded on a fraudulent transaction, is not affected by the discharge, even though he has acquired his right from one to whom the plea might have been competent.

On the twelfth of December, 1876, Henry M. Davis and David Morse were adjudicated bankrupts. On the second day of February, 1877, the above-named plaintiff, Aaron F. Balliett, was duly appointed their assignee. In April, 1877, he commenced this action against

Benjamin Dearborn and Hezekiah Seeley, alleging that the said bankrupts, within three months prior to the filing of the petition against them, being then insolvent, had fraudulently transferred their stock of general merchandise, valued at \$7,000, to the said Dearborn and Seeley, they knowing, or having reasonable cause to believe, that the transfer was made by the bankrupts to defeat the provisions of the bankrupt act, and hinder and defraud their creditors. The plaintiff having recovered a verdict, judgment was entered on the fifth day of February, 1878, in his favor for \$4,936.92. After the verdict against them, but prior to the entry of judgment, Dearborn and Seeley filed their petition in this court, and were duly adjudicated bankrupts. On the sixth of March, 1878, Balliett proved the judgment as a debt against their estate, and thereafter received a dividend of \$1,236.25. On the twenty-first of March, 1881, the said judgment was sold at public auction, and purchased by one John W. Chipman for the sum of \$41. Chipman afterwards sold it to Henry M. Davis, one of the above-named bankrupts, who is now seeking to enforce it against the said Hezekiah Seeley, and has procured an execution to be issued to the marshal, who is about to levy upon the property of the said Seeley by virtue thereof. On the twenty-eighth of February, 1882, the said Seeley was discharged from his debts in bankruptcy. He now moves that the said judgment, as against him, be canceled, or that a perpetual stay of execution be granted. The motion is resisted upon the ground that the judgment, founded upon a fraudulent transfer, is not affected by the discharge.

Daniel McIntosh, for the motion.

Henry M. Davis, *pro se*, opposed.

COXE, J. The motion for a perpetual stay should be granted. The only ground upon which it is resisted is that the judgment was recovered in an action for fraud, and is therefore not affected by the discharge. Even if this proposition were well founded, the party who now owns, and is seeking to enforce, the judgment, is not in a position to avail himself of it, for he is one of the bankrupts, whose fraudulent and collusive transfer made the judgment possible. If the defendants, Dearborn and Seeley, were guilty of fraud in receiving the property of the bankrupts, Davis and Morse were at least equally culpable in making the transfer upon the eve of their bankruptcy; they were the originators and active promoters of the unlawful proceedings. The verdict established their fraud as conclusively as that of the defendants. In the course of time Davis comes into possession of the judgment which his assignee recovered against his companions in fraud. To compel Seeley to pay Davis the amount thus ascertained to be due the estate in bankruptcy as the result of their joint fraud, would be inequitable and unjust. No one should be permitted in this way to profit by his own wrong-doing.

The motion is granted.

BRAGG v. CITY OF STOCKTON.

(Circuit Court, D. California. May 10, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTION OF REMEDIES FOR INFRINGEMENT OF PATENTS.

The patentee may sue at law for his royalty or patent fee, one who infringes by using his invention; or, at his election, sue in equity for the profits arising from such infringement, and for an injunction against further use.

2. SAME—NOVELTY—GONG ATTACHMENTS FOR FIRE-ENGINE HOUSES.

Claims 3 and 4, in patent No. 6,831, re-issued to Robert Bragg, for gong attachments for fire-engines, sustained.

3. SAME—REGISTERING STROKE OF ALARM.

The third claim of patent No. 173,261, issued to Robert Bragg, for an invention registering the number of strokes for giving a fire alarm, sustained.

4. SAME—PRIOR USE—NOTICE.

Testimony taken before the examiner, under objection, tending to show prior use, will be rejected by the court, when no notice of such prior use has been given, and it has not been set up in the answer.

In Equity.

Joseph Leggett and Montague R. Severson, for complainant.

F. H. Smith, for defendant.

SAWYER, J., (*orally*.) In this case I have had some difficulty in determining, under the decisions in the circuit courts on the subject, whether or not the bill in equity should be maintained. See *Smith v. Sands*, 24 Fed. Rep. 470, and cases cited. It does not appear that this defendant has ever made or sold any machines including the invention in question, or that it intends to do anything of the kind, but has only used some three or four machines which other parties made for it, there being no evidence of an intention to use any other machines than those it now has.

As compensation for the machines used is prayed for, the question arises whether complainant will be entitled to an injunction. As said in the case of *Spaulding v. Page*, 1 Sawy. 703, I think the complainant may waive a license fee, and elect as his remedy an injunction against the further or continued use of the machines. Of course, if he can do that, he can maintain his suit in equity. But in order to do that he cannot recover a *royalty* upon those machines; for by paying the royalty the defendant would be entitled to use them until worn out, and should not be enjoined from so doing; and for the royalty his remedy at law is simple. Complainant would have to be limited to the profits and damages arising from the use of those particular machines, up to the time of the restraining of their further use, if a perpetual injunction against further use is sought. In that aspect, I think it is a proper case for equity jurisdiction, on the ground that the complainant is entitled to an injunction, without dam-

ages, if he prefers, or to an account of profits to the present time, and to an injunction against further use.

In *Birdsell v. Shaliol*, 112 U. S. 487, S. C. 5 Sup. Ct. Rep. 244, says Mr. Justice GRAY:

"But an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary, he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed."

It would seem that the injured party should be the one to elect that one of two remedies against a wrong-doer which he deems most advantageous. An injunction against further use may be preferable to a license fee. The mere license fee is not a complete recompense, when the patentee is driven to the expense of a lawsuit by the wrong-doer.

From a careful examination of the evidence, I think the third and fourth claims of reissued patent No. 6,831; also the third claim of letters patent No. 173,261,—have been infringed by defendant by the use of the inventions covered by these claims. Unless enjoined it is evident that defendant will continue to use those machines which it already has. I think, also, that these claims are valid.

An attempt was made to establish an anticipation of the invention covered by the third claim of letters patent No. 173,261. As in most cases where a valuable invention has been patented, a witness appeared who testified that, prior to the date of the patent, he saw something like it. I am not satisfied that the witness who testified in this case on that point ever made a device like that described in third claim of patent. There is no other testimony to support his statement. If he made the machine for Stephen D. Field, as he testifies, and it was used for several years so publicly, in San Francisco, as he states, there would certainly have been other witnesses who would have seen it. In the case of *Bragg v. City of San Jose*, in this court, in relation to the device which he says he manufactured for Field, this same witness gave a very different description from that which he gives in this case; and his testimony in the San Jose case has been introduced in this case to contradict his testimony now given. His testimony in that case was in accordance with the exigencies of that occasion. His uncorroborated testimony, therefore, in view of his inconsistent testimony before given, is unsatisfactory. The testimony of the witnesses Phelps and Edmonds is wholly rejected, because no notice of such testimony was given in the answer, or as required by the statute; consequently, there was no issue to which their testimony could be made applicable, and the testimony was improperly taken. I would suggest, generally, that, in practice before the examiner, counsel are in the habit of insisting upon introducing incompetent testimony, with the hope, I presume,

that it may be considered by the court. But it is merely a waste of time and money to take such testimony, as the court must reject it when it comes to an examination of the case.

Let there be a decree in favor of complainant, sustaining the third and fourth claims of reissued letters patent No 6,831, and the third claim of letters patent No. 173,261; and a reference to the master for an accounting for the profits arising from the use by defendant of the infringing machines up to the present time; and that a perpetual injunction issue, restraining the future use of the inventions by defendant.

MOFFITT v. CAVANAGH.¹

EMERY and others v. SAME.

(Circuit Court, S. D. New York. May 8, 1886.)

1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT—LICENSE FEE.

On the accounting, in a suit for infringement of two patents, complainant relied upon a license under three patents, one of these being one of the patents infringed, a proper deduction to be made on account of the non-use of the other two; but, as only two out of the six claims of the patent infringed were held valid, and those claims were unimportant, *held* only nominal damages could be allowed.

2. SAME.

Where a license offered in evidence to establish the measure of damages for infringement was based upon two patents, one of which was the patent infringed, and the other had been declared void, and there was no important evidence as to the value of the use of the valid patent, *held*, that only nominal damages could be allowed.

In Equity.

William A. Macleod, for complainants.

Lucien Birdseye and *William S. Lewis*, for defendant.

SHIPMAN, J. These are exceptions by the respective complainants to the master's reports in which he found nominal damages only in each of the above-entitled causes. The Moffitt suit was for infringement of patents No. 178,869 and No. 209,826. The Emery suit was for infringement of patent No. 147,288, granted to Simonds and Emery, February 10, 1874. All these patents related to machines for making heel counters or stiffeners for boots and shoes. The facts upon which the reference to the master was decreed are given in the opinions of the court in 17 Fed. Rep. 336, and Id. 242.

Moffitt licensed Cavanagh to use two machines containing the improvements described in letters patent reissue No. 6,162, No. 159,702, and No. 178,869; the licensee paying three mills for each pair

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

of counters made upon said machines and sold. The complainants relied entirely upon this license fee, and the proper deduction to be made therefrom, as the rule or basis for an ascertainment of damages.

No. 178,869, known as the double process patent, contained six claims. The alleged invention consisted mainly in a double process for making a counter from a blank; the first consisting in shaping it by means of a former moving upon an axis, and suitable means for holding the blank up to the former, the machine for performing this part of the process having been patented to Moffitt by reissue 6,162; and the second process consisting in moulding the counter so formed over a male mould of the desired form. The first part bent the blank to a "clam-shell" form, and the second turned the "clam shell" into a completely moulded counter. The machinery by which the second part was performed was covered by the first and fourth claims of the Simonds and Emery patent, which Moffitt was licensed to use, and which he, in fact, permitted Cavanagh to use when he granted the license hereinbefore mentioned. After this license was granted, Moffitt, voluntarily and without compensation, put into the machines the improvements described in No. 209,826. The court found that claims 5 and 6 only of No. 178,869, and which covered unimportant parts of the machine, were valid, and that claims 1, 3, and 4, of No. 209,826 were valid. Reissue 6,162 has been held by the supreme court to be void. *Moffitt v. Rogers*, 106 U. S. 423; S. C. 1 Sup. Ct. Rep. 70. No. 159,702 is admitted to have been of no pecuniary importance.

It will thus be seen that, of the three patents which Cavanagh was licensed to use, one is void, the second is immaterial, and only two unimportant claims of the third are valid. Moffitt says in reply that, although No. 6,162 is void, yet that No. 209,826 was a valid substitute therefor, and that by means of this substitute Cavanagh had the benefit of the machine which he was licensed to use. It is unnecessary to consider any legal objection to this proposition, for it is not supported by the facts. No. 6,162, as will be seen by the decision in *Moffitt v. Rogers*, was a broad patent, and, if it had been sustained, covered a valuable invention, while No. 209,826 is a very narrow patent, and was only sustained upon a technicality. There was no evidence before the master, and, in my opinion, no evidence could have been produced, which would justify a finding of anything more than nominal damages for an infringement of so much of the valid Moffitt patents as were used by Cavanagh.

In the Emery suit the complainants say that the master erred in his finding of nominal damages only, because "the facts before him were sufficient to warrant a computation of damages upon the principle of an established fee. Although the double process claim of the 1876 patent named in the license was held void, Cavanagh continued to enjoy practically the benefits of that claim by virtue of the

presence in the machines of the Simonds and Emery device of the divided mould, without which the said process could not be worked out, which Simonds and Emery device the complainant had acquired from Simonds and Emery the right to put in the machines, and which device the court decided to be validly claimed in the Simonds and Emery patent. Therefore, whatever valuation, under the license agreement between Moffitt and Cavanagh, belonged to the double process claim of the 1876 patent, and would have been a proper measure of damage under that claim, if it had been held valid, is to be taken as the proper measure of damage for the subsequent unlicensed use of the Simonds and Emery divided mould, the use of which in the machine was the use of the process to all practical intents and purposes." A sufficient answer to this exception is that Cavanagh's license fee was based upon the use of the double process, which consisted in the use of No. 6,162 and No. 147,288, and that the use of the Simonds and Emery mould alone was not practically the use of the double process. There was no testimony which could justify a finding of how much the use of one machine only was worth. Simonds' testimony upon this point I do not regard as valuable.

It is unimportant to consider the exceptions in the Moffitt case in regard to the number of counters which Cavanagh made, because, whatever the number, the finding of nominal damages must be the same.

The exceptions in both cases are overruled, and the master's reports are confirmed. The final decree in the Moffitt case should be without costs.

THE MARTHA BROWER.¹

(*District Court, D. Massachusetts. May 4, 1886.*)

1. COLLISION—CHANGE OF COURSE—DEFECTIVE LOOKOUT—CONFLICTING TESTIMONY—PRESUMPTIONS ARISING FROM COMPARISON OF VESSELS.

The schooner C. collided with the schooner M. The former was a small fishing vessel; the latter, a large coaster. At the time of the collision the weather was clear, the wind light, and blowing steadily from the southward. At the time of sighting each other the vessels were sailing on nearly parallel lines; the course of the C. being S. E., that of the M., N. W. by W. The speed of the C. was six knots; that of the M., three knots. The former was close-hauled on the starboard tack, while the latter was on the port tack, with the wind free. The testimony on the part of the C. was that when they first sighted the green light of the M. it bore from two to three points on their port bow, and was distant about three-quarters of a mile; that shortly afterwards both lights became visible, and that the M. continued to come directly on to the C., and struck the latter on her port side. It is further asserted on the part of the C. that during all of this time her course remained unchanged: The testimony on the part of the M. is that when they first sighted the red light of the C. it bore two points on their starboard bow, and was distant

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

about three-quarters of a mile; that the helm of the M. was ordered hard a-port, but that instead of a red a green light appeared on their port bow, whereupon the helm of the M. was starboarded; that shortly afterwards the red light again appeared crossing their bow, and rendering a collision inevitable. *Held*, that the case having been presented on both sides upon the theory that one or the other of these maneuvers actually happened, the probabilities point to the conclusion that the C. was the guilty vessel.

2. **SAME—PRESUMPTIONS ARISING FROM A COMPARISON OF THE CHARACTER AND MANAGEMENT OF THE TWO VESSELS.**

The circumstance that the master of the M., an experienced mariner, was in charge of the deck; that he had under him a sufficient watch, a competent lookout, and a capable helmsman; and that the approach of the C. was plainly seen, renders it improbable that under such circumstances the M. would have first kept off two points and then luffed eight points. The circumstance that the master of the C. was below, and did not come on deck until just before the collision; that the lookout, a lad of 18, and the wheelsman, were the only people on duty; and that neither of them had been placed in charge of the vessel, or had orders how to act in case of emergency, cannot be disregarded. A comparison of the character, speed, and management of the two vessels renders it much more likely that the C. was guilty of the wrong maneuver than the M. This presumption is not rebutted by the testimony of the master of the C. with regard to the rudder of the M., as seen by him after the collision.

3. **SAME—NEGLIGENT LOOKOUT—FRIGHT OF HELMSMAN.**

The collision arose undoubtedly from the failure of the lookout on the C. to see the light of the M. until she was close aboard. The change of course followed as the result of the fright and confusion of the man at the wheel.

Libel by the owners of the schooner *Cyrena Ann* against the schooner *Martha Brower*, to recover the loss sustained by a collision between the two vessels.

W. W. Dodge, for libelants.

C. T. Russell, Jr., for claimants.

NELSON, J. The *Cyrena Ann*, a small fishing schooner of 57 tons, belonging to Portland, Maine, left Gloucester on the morning of August 5, 1885, for a mackerel trip in Barnstable bay. At 8 P. M. of the same day she was 12 miles S. E. by E. from Minot's light, close-hauled on the starboard tack, steering S. E., the wind being southerly, light, and steady; the evening clear and fine; her speed six knots. The *Martha Brower*, a three-masted schooner of 612 tons register, belonging to Somers' Point, New Jersey, was on a voyage from Philadelphia to Boston, with a full cargo of 914 tons of coal, and drawing 15 feet of water. She was sailing on the port tack, with the wind free, her course N. W. by W., and her speed three knots. In the collision the *Martha Brower* struck the *Cyrena Ann* head on, a little forward of the port beam, cutting into the main hatch, and the latter filled and sunk in half an hour. The *Martha Brower* suffered the loss of her jib-boom and some of her forward sails and rigging, but was otherwise uninjured. The account given of the collision by Capt. Thompson, of the *Martha Brower*, in which he is corroborated by all the men on deck, is as follows: At about 8 o'clock, the starboard watch, consisting of the master, the second mate, and two able seamen being on deck, the master in charge, the lookout reported the red light of the *Cyrena Ann* two points on the starboard bow, three-

quarters of a mile away. The master, after examining her with his glasses from the starboard quarter, and judging her by her sails to be heading S. E., ordered the helm to be put hard a-port. He then stepped over to the other side of the deck, expecting the light to appear over the port bow, as would have happened if the other vessel had kept her course; but not seeing it, he stepped back to leeward, and saw the approaching vessel's green light, and then ordered the helm to be steadied. The Cyrena Ann then suddenly sprung her luff, showed her red light, and crossed under the bows of the Martha Brower, thus causing the collision. On the side of the Cyrena Ann, the story of the collision, as told by her lookout and the man at the wheel, is this: The green light of the Martha Brower was first seen between two and three points on the port bow, three-quarters of a mile off, and then both her lights became visible in the same direction, indicating that she was keeping off. The next seen of her was that she was coming directly into the Cyrena Ann on the port side, the Cyrena Ann in the mean time having made no change of course whatever.

It is obvious, from the relative positions of the two vessels, that either the Martha Brower, after keeping off two points, as it is agreed she did, luffed; or that the Cyrena Ann, instead of keeping her course as she ought to have done, having the right of way, first kept off, and then luffed across the bows of the Martha Brower; and the case was presented on both sides upon the theory that one or the other of these maneuvers actually happened. The question is, which side is to be believed? It seems to me that all the probabilities of the case point to the conclusion that the Cyrena Ann was the guilty vessel. The Martha Brower was a large, deeply-laden vessel, drawing 15 feet of water, with a valuable cargo on board, approaching Boston in the track of all southern and eastern commerce. She was in charge of her master, a seaman of long experience in coastwise navigation, with a watch of three men on deck, with one able seaman on the lookout and another at the wheel. She was proceeding at a low rate of speed, in a light wind, against a strong ebb-tide. The approach of the Cyrena Ann was plainly seen. That, under such circumstances, she either would or could have first kept off two points, and then luffed eight points, is extremely improbable. On the other hand, to the Cyrena Ann, a small fore and aft fishing schooner, without cargo, nearly or quite close-hauled, with all sails set and going with the tide, at twice the speed of the Martha Brower, such a change of course was not impossible. The only men on deck were the lookout, who was a lad 18 years old, and the man at the wheel. Neither of them had charge of the vessel, and they had received no orders how to act in case of an emergency. The skipper and the rest of the men were below. The lookout, some time before the collision, went below to call the skipper, who came on deck just as the collision happened.

Comparing the character and management of the two vessels, it is

much more likely that the Cyrena Ann was guilty of the wrong movement than the Martha Brower. The depositions of the two men on deck on the Cyrena Ann are by no means satisfactory. They indicate great ignorance, or else want of truthfulness, and are untrustworthy. The accident arose, undoubtedly, from the failure of the lookout of the Cyrena Ann to see the light of the Martha Brower until she was close aboard, and the change of course followed as the result of the fright and confusion of the man at the wheel.

The skipper of the Cyrena Ann testifies that after the accident he took a boat, and rowed under the stern of the Martha Brower, and found her rudder turned hard to port. Great reliance is placed on this fact by the libelants. But the collision itself would have the effect to throw the Martha Brower's stem to port, and the rudder would naturally follow the movement of the stem in the same direction. It might also have been changed in the efforts to back off. The fact is not sufficient to overcome the testimony from the Martha Brower that her helm was steadied, and the other strong presumptions in her favor.

Libel dismissed, with costs.

THE ANNEX No. 3.¹

HOGG v. THE PENNSYLVANIA ANNEX No. 3.

(District Court, E. D. New York. February 27, 1886.)

COLLISION—FOG—IDENTITY OF COLLIDING VESSEL—ALIBI.

On the evening of February 6, 1884, a vessel collided with the steamer Western Texas, which was lying at Pier 9, East river; but, owing to the darkness and a thick fog which prevailed at the time, it was impossible to distinguish clearly the boat which did the damage. At about that time, on the same evening, the Pennsylvania Annex No. 3, on her way from Brooklyn to Jersey City, was in collision with some object in the vicinity of Pier 9. Suit was brought against Annex No. 3 for the damage sustained by the Western Texas. The claimants denied the identity of the colliding vessel with the Annex boat. *Held*, on the evidence, that the libelant had not proved that the damage in question was done by Annex No. 3, and that the libel should be dismissed.

In Admiralty.

Evarts, Choate & Beaman, (Treadwell Cleveland,) for libelant.

Goodrich, Deady & Goodrich, for claimant.

BENEDICT, J. This action is to recover of the ferry-boat Annex No. 3 the damages sustained by the steamer Western Texas by being run into on the evening of February 6, 1885, while lying along-side Pier 9, in the East river. At the time this damage was done to the West-

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

ern Texas a fog of extraordinary density was prevailing, and the only question at issue is whether the boat Annex No. 3, here proceeded against, was the boat by which the damage in question was done. Over this question the contest has been severe, and a large amount of testimony has been taken. I have given this testimony a careful examination, aided by elaborate briefs from the advocates, and my conclusion is that the libelant has not proved that the damage in question was done by Annex No. 3. My view respecting some of the positions taken in behalf of the libelant may be stated.

It being conceded that in this same fog Annex No. 3 made a trip from Brooklyn to Jersey City, and during the trip came in contact with something, within a short distance of the place where the Western Texas lay when struck, it is claimed to be a singular coincidence that two vessels, bound down the East river, at nearly the same time, brought up on the New York shore at nearly the same place. I see nothing so very singular in such a coincidence. There would be nothing unusual in two or more ferry-boats, even, passing down the East river at nearly the same time, and nothing strange if, in such a fog, more than one of them should bring up in the locality where the Western Texas was moored. Unless several persons who were passengers on the Annex No. 3 on the trip she made, who have no interest in the controversy, have sought to mislead the court as to what occurred on the trip, it seems impossible that such a blow as was received by the Western Texas was delivered by Annex No. 3 during that trip. Every passenger called, save one called by the libelant,—as to whose veracity there is cause for doubt,—testifies that the touch of Annex No. 3 upon what she struck was altogether too light to do damage, and there is testimony going to prove, as a fact, that what Annex No. 3 touched was a pier.

Great reliance is placed by the libelant upon the testimony of two witnesses who were upon the schooner Jordan L. Mott, a vessel lying in the same slip with the Western Texas at the time she was damaged, and who saw the boat that did the damage. But these witnesses testify to seeing more than I think it possible for them to have seen, considering their position and the density of the fog. It is difficult to understand how there could have been any collision at all if it were possible to see as well as these witnesses say they saw. Besides, one of them says that pieces of wood were knocked off the boat that ran into the Western Texas, fell into the water, and he vainly endeavored to secure one of them. No pieces of wood were broken off Annex No. 3, as is plainly proved.

Again, it is argued, from the strength of the tide and the testimony of those on Annex No. 3 respecting her speed, and an estimate of her weight, that she would have delivered a blow of 8,000 tons weight. If this be so, it seems to my mind impossible that Annex No. 3 could have delivered a blow upon the rigid iron side of the Western Texas, lying along-aside a pier, not only without injury to her-

self, but also leaving her bow free from any marks indicating that she had been in collision. I gain no light upon the question at issue from the testimony respecting the direction of the blow received by the Western Texas, nor from the testimony showing want of anxiety on the part of those on Annex No. 3 to learn what object she came in contact with, nor from the shreds picked from the broken plate of the Western Texas.

The testimony respecting the hail from the Western Texas, and the lights seen on the boat that did the damage, makes against the libelant, as it seems to me. The testimony raises a doubt in my mind whether the boat that struck the Western Texas had the iron folding barrier which is upon the Annex No. 3, although there is no doubt that there was some sort of fence upon her.

There remains to allude to what should, I think, be considered decisive of the case, namely, the record of the ferry-boat's time of departure from Brooklyn, and her arrival at Jersey City, on the trip when it is claimed by the libelant that she ran into the Western Texas. Such records were kept at both places in the regular course of the business of the ferry. They are produced by the claimant, to show—as they do show—that Annex No. 3 was not in the neighborhood of the Western Texas at the time she received the damage in question. These records, as they stand, are conclusive against the libelant. But these records are challenged by the libelant. The one showing the time of departure it is insisted has been altered in the figures; the other, showing the time of arrival, it is insisted has been fabricated for the purposes of this suit.

The charge that the figures showing the time of the boat's departure from Brooklyn have been tampered with has for its basis an apparent alteration in a figure in the entry of the time of the departure. But alterations in other figures are apparent elsewhere in the record, and a change of a figure in an entry of this character may easily occur, and is not, by itself, sufficient to prove a fraudulent intent to falsify the record. The effort to conceal the change of the figure, which is greatly relied upon as being proved by the paper itself, is not apparent to me. I see no material difference between this entry and other entries in the same record, where there is no reason to doubt that the figure was changed, at the time of making the entry, to make the entry correspond with the facts.

The charge that the record of the boat's arrival in Jersey City on each trip is a fabrication has for its basis the fact that the edges of that one of the sheets produced which contains the record of the day in question show a green stain, such as would appear on a sheet that had been once bound in a book, and there are indications that the sheet in question had been trimmed, whereas the records at Jersey City were kept on loose sheets, and not bound in a book, while the records kept in Brooklyn only were bound in a book. Here the difficulty is that other sheets of the records kept at Jersey City, hav-

ing no bearing whatever on this controversy, and which, as produced, could not have been substituted for the purpose of affecting the present suit, are similar to the sheet in dispute. In the March records there are three such sheets. Undoubtedly the peculiarity in the disputed sheet entitled the libellant to require positive proof of its genuineness and accuracy. That proof has been furnished by the testimony of those who made the entries and produced the sheets, and evidence has also been furnished from the office where the blank sheets were printed, tending to show how sheets like this might be produced without ever having been bound in a book, although, of course, there is no evidence from the printer in regard to these particular sheets.

Notwithstanding, therefore, the bold assertion that these sheets convict the claimants of endeavoring to escape liability in this action by "fraud, perjury, and forgery," I am of the contrary opinion. To my mind, these sheets alone prove that the libellant has mistaken the vessel to proceed against, and compel a decision of this case adverse to the libellant.

THE MAGGIE WILLETT.¹

(*District Court, D. Massachusetts. April 28, 1886.*)

SALVAGE—AWARD—CIRCUMSTANCES OF UNUSUAL PERIL TO LIFE AND PROPERTY SAVED—REFUSAL OF INADEQUATE COMPENSATION.

The schooner *M.*, while at sea, encountered heavy weather, and in consequence lost her sails, sprang her foremast, carried away her main-boom and gaff, and was otherwise severely crippled. All of her water, cooking utensils, and fuel were washed overboard. Her men were, for five days, left without fuel and water, and suffered severely. When found, she was in the vicinity of a dangerous shoal, upon which she was drifting. In answer to a signal of distress, the *D.*, a fishing schooner, came to her assistance. The crew of the *M.* were taken on board of the *D.*, and a relief crew from the *D.*, with provisions, fuel, and sails, were placed on board of the *M.* The *D.* abandoned her voyage, and convoyed the *M.* to a port of distress. The time consumed was about three days. The master of the *M.* offered the master of the *D.* \$1,500 if he would put him aboard of his own vessel, stay by him, and convoy him to port. This offer was refused. *Held*, that the sum offered was inadequate for the service, as it involved the giving up of the *D.*'s trip, and the salvors were not bound to accept it. The value of the *D.* was \$10,000. The loss by the abandonment of their voyage, though uncertain, was considerable. The value of the *M.* and cargo was \$11,000. The labor of bringing the *M.* into port, the loss of the *D.*'s trip, and other circumstances, entitle the salvors to a compensation of one-third of the value of the property saved.

Libel by the owner, master, and crew of the fishing schooner *Dido*, of Gloucester, against the British schooner *Maggie Willett*, of St. Johns, New Brunswick, and her cargo, for salvage.

C. A. Russell and *F. Dodge*, for libellants.

Charles T. Russell, Jr., for claimant.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

NELSON, J. At sunrise on the morning of December 31, 1885, the *Dido*, then on a fishing voyage on George's banks, in latitude 41 deg. 9 min. N., and longitude 66 deg. 30 min. W., fell in with the British schooner *Maggie Willett*, in a disabled condition, flying a signal of distress. It appears from the protest of the master, and the other evidence in the case, that the *Maggie Willett* sailed from Halifax on the twenty-fifth of December, 1885, bound for New York, with a cargo of dried and pickled fish. On the day following she encountered a violent gale from N. E., in which all her sails were torn or blown away, her main-boom and gaff broken, her foremast sprung, the coat around her mainmast damaged, her bulwarks and galley broken in, her house started, and her boats, galley-stove, and all her water, fuel, and cooking utensils washed overboard by the seas. The place where she was discovered was in the vicinity of dangerous shoals, upon which she was drifting. Her men had been without fresh water for five days, and were suffering severely from hunger, thirst, and cold. They were taken on board the *Dido*, and their wants supplied. Afterwards six men from the crew of the *Dido* were put on board of her, with provisions and fuel, and the *Dido's* stay-sail and riding-sail, and she was then taken in tow by the *Dido*, and started for Gloucester. After towing 13 hours the tow-line parted, and from that time she proceeded under the riding and stay sails and the remnants of her own sails, the *Dido* accompanying her, and arrived in Gloucester the morning of January 3d. The disputed points were whether the master of the *Dido* took any unfair advantage in getting possession of the *Maggie Willett*, and was justified afterwards in retaining possession of her.

There is no evidence in the case to sustain the defense that the *Dido's* men, by exaggerating the danger, worked upon the fears of the men on the *Maggie Willett*, for the purpose of getting possession of her. The extreme peril of the situation was recognized by all, and Capt. Bissett, of the *Maggie Willett*, admits that he was taken off at his own request. When first spoken by the *Dido*, Capt. Bissett asked to be supplied with water and sails, and was answered that water could be furnished, but that the *Dido* had no spare sails. As two sails from the *Dido* were afterwards used in navigating the *Maggie Willett* to Gloucester, the inference is drawn that in refusing to supply them Capt. Thomas, of the *Dido*, did not act in good faith. But the explanation is simple and satisfactory. The riding-sail and stay-sail were the sails used on the fishing ground for keeping the vessel in position while the crew were engaged in fishing, and were indispensable for that purpose. Without them the voyage would have to be abandoned. She had no spare sails which she could furnish if she continued on the fishing ground. She could be navigated without them, but her men could not fish. There was no misrepresentation when they were refused. Capt. Bissett states in his protest that before starting for Gloucester he requested to be put aboard his vessel

again, and this was refused. But in his deposition he swears that he offered Capt. Thomas \$1,500 if he would put him aboard, and stay by him till he got to Gloucester, and this was refused. This offer the salvors were not bound to accept. The sum offered was quite inadequate for the service to be rendered, as it involved the giving up of the Dido's trip. The offer of Capt. Bissett could hardly have been made in good faith, since neither he nor his men were in a condition to take charge of the vessel, and the men refused to return on board, as they had a right to do.

I find no evidence in the case to sustain the charge of misbehavior on the part of the men on the Dido. On the contrary, their conduct seems to have been humane and considerate in every respect.

Considering the desperate condition of the Maggie Willett when rescued, the labor of bringing her into port, and the loss of the Dido's trip, a very liberal compensation should be decreed. The value of the Dido and her outfit was \$10,000. The loss by the abandonment of her voyage, though uncertain, was undoubtedly considerable. The value of the Maggie Willett and her cargo was \$11,000. In a case very similar to this in its circumstances, where the value of the ship and cargo saved was \$90,000, Judge LOWELL gave one-fourth of the value. *The Lovett Peacock*, 1 Low. 143. As the value in this case was less, I think the proportion should be larger, and shall decree one-third, or \$3,667. I make no order as to the distribution among the salvors of the amount awarded, as it was stated at the hearing that they would agree upon a distribution.

Decree for the libelants for \$3,667, with costs.

THE J. J. DRISCOLL.¹

(District Court, E. D. New York. March 22, 1886.)

1. TOWAGE—SPEED—STEAMER'S SWELL—DAMAGE TO CARGO—LIABILITY.

Where the tug D. started to tow a lighter from Brooklyn to Hoboken, and took her too rapidly through the swells of a large steamer, which caused the lighter to fill with water, and subsequently to careen, and lose part of her cargo, *held*, that the tug was answerable for the loss.

2. SAME—OFFER TO PUT LIGHTER IN SAFETY—DUTY OF TUG—NEGLIGENCE—CHOICE OF COURSES—ERROR OF JUDGMENT.

Testimony was offered to show that after the danger to the lighter became apparent the tug proposed to take her to a place of safety on the New York shore, but the master of the lighter objected. *Held*, that the tug would not be relieved from her duty to put the lighter in a place of safety by an objection from the lighter's master; and if the duty of deciding upon the proper course was upon the master of the lighter, an error of judgment on his part would not relieve the tug, since it was her negligence that brought upon the captain of the lighter the necessity of making such decision.

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

In Admiralty.*Goodrich, Deady & Platt*, for libellant, Silas T. Havens.*Benedict, Taft & Benedict*, for claimant.

BENEDICT, J. Upon all the testimony I am of the opinion that the cause of the lighter's taking in water as she did was not a leak in the lighter, nor an overload, but the speed at which she was towed through the swells of steam-boats' waves in the North river. I am also of the opinion that it was negligence in the tug to tow the lighter through these swells at a rate of speed sufficient to cause her to take water as she did. The result of this negligence was that the water thrown into the lighter rendered her unseaworthy, and put her in danger of sinking, and the subsequent capsizing of the lighter, and loss of much of her cargo, was the immediate consequence of this negligence. The liability of the tug follows.

There is in the case testimony from the tug that, after the danger to the lighter became apparent, the tug proposed to take her into the nearest dock on the New York shore, and there is testimony warranting the conclusion that if that course had been pursued the loss in question would have been avoided. On the other hand, there is testimony from the master of the lighter that he proposed to the tug to take the lighter to the New York docks, and that the proposition was not acceded to by the master of the tug. But the testimony of the tug-men on this point, if taken as true, does not assist the tug. If it be assumed that the plight to which the lighter was reduced by the negligence of the tug cast upon the tug a duty to put the lighter in a place of safety, the tug would not be relieved from that duty by an objection from the master of the lighter. If, on the other hand, the duty of deciding upon the proper course to be pursued to secure the safety of the lighter after she had taken the water was upon the master of the lighter, an error of judgment committed by him in arriving at the decision to attempt to make the Jersey shore—excusable as it was under the circumstances—would not relieve the tug, for it was the tug's negligence that brought upon the captain of the lighter the necessity of deciding whether to go to New York or New Jersey. An error of judgment committed by the master of the lighter under such circumstances can have no effect to relieve the tug from liability for a loss which was an immediate consequence of the act of negligence found to have been committed by her.

THE VENNER.¹

(District Court, E. D. New York. December 15, 1885.)

1. CARRIER—OF GOODS BY SHIP—DAMAGE TO CARGO—ODOR OF PETROLEUM—PROOF.

On the evidence, *held*, that the damage to canary-seed, claimed by libelants to have occurred from the odor of petroleum, while on the bark Venner, had not been proved, and that the action must therefore fail.

2. SAME—DELIVERY OF CARGO—SHORTAGE—BILL OF LADING—"WEIGHT AND CONTENTS UNKNOWN"—EVIDENCE.

There can be no recovery for short delivery where the bill of lading says "weight and contents unknown," and no testimony is offered to show how much cargo was shipped, while the testimony from the ship is that all taken on board was delivered.

In Admiralty.

Scudder & Carter, for libelants, D. V. Arguimbau and others.

Wilcox, Adams & Macklin, for claimant.

BENEDICT, J. If the canary-seed while on board the vessel was damaged by petroleum, the liability of the vessel for such damage cannot be disputed, whether the damage arose from actual contact with petroleum, or from the fumes of petroleum caused by the heat of the hold. The decisive question of the case is whether the seed was so damaged while on board the vessel. Upon this question of fact the testimony is conflicting, and I am unable to say that the existence of such damage to this seed at the time of its discharge from the ship has been proved. Furthermore, there is uncontradicted testimony that no odor of petroleum could be detected on the seed claimed to have been damaged, when carefully examined some time subsequent to its discharge; that a sample taken from this part of the seed was actually fed to a canary, and eaten by the bird without objection or injury; and a sample is produced in court in which no odor of petroleum is discovered. This testimony seems to prove that, if the seed had been tainted with the odor of petroleum while on the vessel, that odor disappeared in time, and left the seed as valuable as before. Such being the fact, the action must fail because no damage is proved. In this connection it is to be remarked that there is no evidence that the seed was sold as damaged, and if the sample produced in court is a fair sample, as is testified, no reason is seen for selling it as damaged.

There is also a claim for short delivery; but the bill of lading says: "Weight and contents unknown." No testimony is offered to show how much the bags contained when shipped, and that they were all full, and the testimony from the ship is that all taken on board was delivered.

¹ Reported by R. D. & Wyllys Benedict, Esqs., of the New York bar.

THE NELLIE BLOOMFIELD.¹

(District Court, D. New Jersey. April 28, 1886.)

SEAMEN — LIEN FOR WAGES — STALE CLAIM — PRIORITY OF BONA FIDE LIEN CLAIMANTS.

In the distribution of the proceeds of a sale, the libellant, a former mariner, claimed, as against a material-man, wages for three years. From the libellant's own testimony it appeared that over two years had elapsed before the institution of the present proceedings; that he had been in the neighborhood of the vessel and her owner during all the time; and that no excuse whatever was given for this long delay. It further appeared that during all this time he had not heretofore made any attempt to collect the debt. *Held*, that public policy requires that such liens should not be enforced, to the detriment of other *bona fide* lienors, after such a lapse of time, and without the assignment of any reason for their having lain so long dormant.

In Admiralty.

Goodrich, Deady & Platt, for Cahill and others.

Bristow, Peet & Opdyke, for New York Emery Company.

NIXON, J. The commissioner has found due to the libellants as follows: To Thomas W. White, for wages, \$19.50; to Peter Karney, for wages, \$2.76; to James Cahill, for wages, \$37.87; to Matthew Keefe, for wages, \$17.88; to Thomas Dunn, for wages, \$16.12; to John Cahill, for wages, \$509.24. The New York Emery Company, a subsequent libellant, excepts to the allowance of anything to John Cahill, upon the ground that his claim has become stale, and must be deemed as abandoned by lapse of time. His statement, under oath, is that he went on board of the Bloomfield in March, 1880, and left her in December, 1883, there being due to him for wages at the time of leaving \$450. The commissioner has found due this sum, with interest to the date of his report. The libellant gives no excuse for his long delay in enforcing his lien. The testimony shows that he has been in the neighborhood of the vessel and her owner during all the time, and has made no attempt to collect the debt. Public policy requires that such liens should not be enforced to the detriment of other *bona fide* lienors, after such a lapse of time, and without the assignment of any reason why they should have lain dormant so long. This exception is therefore sustained.

Let a decree be entered in favor of the other libellants for the sums found due to them respectively, and let the claim of the New York Emery Company be referred to a commissioner to ascertain and report the facts to the court.

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

THE SOUTH CAMBRIA.

ROWLAND v. THE SOUTH CAMBRIA.

(District Court, D. Delaware. May 14, 1886.)

1. PILOTAGE—VALIDITY OF STATE LAWS.

The provisions of a state law, regulating pilots and pilotage, which are in direct and manifest collision with the act of congress of March 2, 1837, concerning pilots, *held*, to be inoperative and void.

2. SAME—CONSTRUCTION OF THE ACT OF CONGRESS OF MARCH 2, 1837.

A law of the state of Delaware provides that the first duly-licensed pilot who may offer himself to any inward bound vessel in the Delaware bay, requiring a pilot, shall take charge of her, and that if his services are refused he may sue the master, owner, or consignee thereof for full pilotage. The act of congress of March 2, 1837, (5 St. 153,) enacts "that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding." *Held*, that, although the Delaware bay and river do not constitute a boundary between the states of Delaware and Pennsylvania, these states, being coterminous, and bordering on the same navigable waters, come within the spirit and meaning of the act of congress, which was intended to neutralize the effect of adverse and conflicting laws of adjoining states which had exercised, or might assume, an exclusive regulation of pilotage on navigable waters which are the common, though not the separating, boundary of such states. Following *The Clymene*, 9 Fed. Rep. 164; *S. C. 12* Fed. Rep. 346; *The Ullock*, 19 Fed. Rep. 211; *The Abercorn*, 26 Fed. Rep. 877.

In Admiralty.

Flanders & Pugh and *Levi C. Bird*, for libellant.

Morton B. Henry and *Benj. Niels*, for respondent.

WALES, J. This is a libel for pilotage service. On the twenty-second of October, 1885, the British steam-ship South Cambria, bound from St. Jago de Cuba to Philadelphia, when about 20 miles W. by N. from Cape Henlopen, signaled for a pilot. In answer to the signal the libellant, a regularly licensed pilot under the laws of the state of Delaware, and duly authorized to pilot vessels of that class, was put on board the steam-ship, and tendered his services to pilot her to Philadelphia, he being the first pilot to offer himself for that purpose. The master of the South Cambria refused libellant's offer, under instructions previously given by the agent of the owners not to employ a Delaware pilot, and subsequently, on the same day, accepted the services of E. L. Davis, a duly-licensed pilot under the laws of the state of Pennsylvania, who navigated the vessel to Philadelphia. The master selected the Pennsylvania pilot in order to avail himself of the lower rate of charges for pilotage, the difference in this instance being \$26.06. The libellant sues for \$115.50, the amount he would have been entitled to had his services been accepted and performed, by virtue of sections 5 and 6 of the act of the legis-

lature of Delaware regulating pilots and pilotage in the Delaware bay and river, passed April 5, 1881, (16 Del. Laws, 496,) which provides "that every ship or vessel, propelled by steam or sails, arriving from or bound to any foreign port or place, except such as are solely coal-laden, passing in or out of the Delaware bay by the way of Cape Henlopen, shall be obliged to receive a pilot: * * * provided she is spoken, or a pilot offers his services outside of the Cape Henlopen light-house, bearing south-west; and if the master of any such ships or vessels, after she is spoken or a pilot offers, shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel; * * * that the pilot who shall first offer himself to any inward-bound ships or vessels shall be entitled to take charge thereof."

The respondent justifies the master's refusal of the libellant's services, and the employment of a Pennsylvania pilot, under the act of congress of March 2, 1837, (section 4236, Rev. St.,) which enacts that "the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessel to or from such port." The contention of the respondent is that the pilotage law of Delaware, in so far as it conflicts with this act of congress, is invalid, and that by virtue of the latter the master of the South Cambria had the right to select a pilot from either state bordering on the Delaware bay or river, without reference to priority of offer by any such pilot.

It may be considered as settled that the states have concurrent power with congress to pass pilotage laws until congress shall take exclusive control of the subject by the enactment of a general and uniform law, and, in the meanwhile, that such acts as congress shall make are of paramount authority, and all state laws which are in direct and manifest collision with them must yield. 3 Kent, Comm. 390; *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236. Such, also, it may be inferred from the act of congress of August 7, 1789, § 4, was the understanding of the members of that body, many of whom had taken an active part in framing the constitution of the United States. That section is in these words: "That all pilots in the bays, rivers, inlets, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states respectively may hereafter enact for the purpose, until further legislative provision shall be made by congress." 1 St. 54. The question is thus raised whether the compulsory clause of the Delaware statute of April 5, 1881, so conflicts with the act of congress of March 2, 1837, as to be nugatory, and to leave the libellant without any right of action.

The question is not entirely new. The waters of the Delaware

bay and river are not, it is true, the boundary *between* the states of Delaware and Pennsylvania; but it has been held that as these states are coterminous, and border on the same waters, they come within the purview of the act of congress which was intended to remedy the very difficulty which has arisen in this case, to-wit, the attempted enforcement of the compulsory feature of a state statute, and the denial of the rights of the master of a vessel to select his pilot from either of two states when navigating the waters which are common to both. The act of congress of 1837 grew out of disputes between the states of New York and New Jersey as to the employment of pilots, the former asserting the right to prescribe that none but pilots licensed by its laws should be employed in navigating vessels bound to its ports. One of the first cases in which this act came under consideration was *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 311, where the supreme court of Pennsylvania recognized the right of the master of a vessel outward bound from Philadelphia to employ a pilot from either of the states of Pennsylvania, New Jersey, or Delaware. The United States district court for the Eastern district of Pennsylvania has given a similar construction to the act, in *The Clymene*, 9 Fed. Rep. 164. In that case a Delaware pilot, licensed under the Delaware law, of April 5, 1881, had piloted a steam-ship from the entrance of Delaware bay to Philadelphia, and payment for his services was refused on the ground that by an act of assembly of Pennsylvania, approved February 4, 1846, it was made an indictable offense for any person to pilot a vessel to Philadelphia without having a license from the board of wardens of that port; hence his contract was illegal. The court, however, decided that whatever may have been the extent of state authority on the subject of pilotage prior to the act of 1837, it could not be exclusive thereafter; that congress did not intend by the act to interfere with the proper exercise of state authority, but to provide against an abusive and hostile exercise of it; that a state could license pilots, and make regulations for their government and employment, but could not exclude others, duly licensed elsewhere, from employment on the public waters of the nation because those waters happened to be within its territorial limits. The precise question was, did the pilot's license authorize him to do what he undertook, notwithstanding the prohibitory law of Pennsylvania? And his claim was sustained on the ground that vessels requiring pilotage might elect whom they would employ. The act of congress, it was said, was intended to apply to just such circumstances, which were clearly within its spirit, and, with a just interpretation of its language, as clearly within its terms. The decree of the district court was affirmed, on appeal, by the circuit court for the same district, which held that the act of 1837 applied to the pilotage laws of coterminous states situated upon the same navigable waters, but which are not the separating boundary between them, such a construction being clearly within the meaning of the act. *The Cly-*

mene, 12 Fed. Rep. 346. See, also, *The Alzena*, 14 Fed. Rep. 174.

The same question was before the United States district court for the district of Oregon. An Oregon pilot, whose services had been tendered to and refused by the master of a vessel, inward bound on the Columbia river, sought to recover pilotage fees because he was the first pilot who had offered, and was entitled, under the Oregon law, to full pilotage. The master of the vessel employed a pilot licensed by the law of Washington Territory. It was decided that although the Columbia river is not a boundary between two "states," in the sense in which the word is used in the constitution, it is a boundary between one such state and an organized territory of the United States, and that the case came within the mischief intended to be remedied by the act of congress; and that under this construction the master had the right to take a pilot from either Oregon or Washington, without reference to which made the first offer of his services. *The Ullock*, 19 Fed. Rep. 211. The same court has recently (March 26, 1886) passed on the same question, and reaffirmed its former opinion. *The Abercorn*, 26 Fed. Rep. 877.

The main purpose of the act of 1837 was, undoubtedly, to neutralize the effect of adverse and conflicting laws of adjoining states which had or might assume an exclusive regulation of pilotage on navigable waters which are the common, though not the separating, boundary of such states; and no better plan for avoiding or deciding controversies springing out of such conflicting laws, short of a general and uniform system, could have been devised than the one contemplated by the act, namely, the conferring on the master of any vessel requiring a pilot the right of electing who shall serve him in that capacity. This was the object aimed at. The mischief to be suppressed was apparent, and the remedy is equally so. Such being the meaning of the act, under a fair interpretation of its spirit and terms, and this construction being supported by the adjudications of state and federal courts, I am constrained to order that the libel in this case be dismissed, and that a decree be entered for the respondent for his costs.

MENACHO and others v. WARD and others.**SAME v. ALEXANDRE and others.**

(Circuit Court, S. D. New York. May 15, 1886.)

CARRIERS OF GOODS—DISCRIMINATION IN RATES—EXCLUSIVE PATRONAGE.

While a common carrier may make discriminations in rates, based upon the quantities of goods sent by different shippers, he cannot charge a higher rate against shippers who refuse to patronize him exclusively.¹

In Equity.

Frederic R. Coudert and Edward K. Jones, for complainants.

James C. Custer and Lewis C. Ledyard, for defendants.

WALLACE, J. The complainants have filed a bill in each of these causes to restrain the defendants from making discriminations for transportation against the complainants, which consist in charging them a higher rate of freight than is charged by defendants to other shippers of merchandise generally. A motion is now made for a preliminary injunction. The facts in each case are essentially the same, and both cases may be considered together.

The complainants are merchants domiciled in the city of New York, and engaged in commerce between that port and the island of Cuba. The defendants are proprietors or managers of steam-ship lines plying between New York and Cuba. Formerly the business of transportation between the two places was carried on by sailing vessels. In 1877 the line of steam-ships known as "Ward's Line" was established, and in 1881 was incorporated by the name of the New York & Cuba Mail Steam-ship Line under the general laws of the state of New York. At the time of the incorporation of this company the line of steam-ships owned by the defendants Alexandre & Sons had also been established. These two lines were competitors between New York and Cuba, but for several years both lines have been operated under a traffic agreement between themselves, by which uniform rates are charged by each to the public for transportation. The two lines are the only lines engaged in the business of regular transportation between New York and Cuba; and unless merchants choose to avail themselves of the facilities offered by them, they are obliged to ship their merchandise by vessels or steamers which may casually ply between the two places.

It is alleged by the complainant that the defendants have announced generally to New York merchants engaged in Cuban trade that they must not patronize steam-ships which offer for a single voyage, and on various occasions when other steam-ships have attempted to procure cargoes from New York to Havanna have notified

¹See note at end of case.

shippers that those employing such steam-ships would thereafter be subjected to onerous discriminations by the defendants. The defendants allege in their answer to the bill, in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havanna, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be "placed upon the black-list" if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants. The freight charges, by the course of business, are paid by consignees at the Cuban ports. The complainants have attempted to pay the freight in advance, but have found this course impracticable because their consignees are precluded from deducting damages or deficiencies upon the arrival of the goods from the charges for freight, and as a result some of the complainants' correspondents in Cuba refuse to continue business relations with them, being unwilling to submit to the annoyance of readjusting overcharges with complainants. Upon this state of facts the complainants have founded the allegation of their bill that the defendants "have arbitrarily refused them equal terms, facilities, and accommodations to those granted and allowed by the defendants to other shippers, and have arbitrarily exacted from them a much greater rate of freight than the defendants have at the same time charged to shippers of merchandise generally as a condition of receiving and transporting merchandise." They apply for an injunction upon the theory that their grievances cannot be redressed by an action at law.

It is contended for the complainants that a common carrier owes an equal duty to every member of the community, and is not permitted to make unequal preferences in favor of one person, or class of persons, as against another person or class. The defendants insist that it is permitted to common carriers to make reasonable discriminations in the rates demanded from the public; that they are not required to carry for all at the same rates; that discriminations are reasonable which are based upon the quantity of goods sent by different shippers; and that the discrimination in the present case is essentially such a discrimination, and has no element of personal preference, and is necessary for the protection of the defendants.

Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person,

or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. *Baxendale v. Eastern Counties R. Co.*, 4 C. B. (N. S.) 78; *Branley v. Southeastern R. Co.*, 12 C. B. (N. S.) 74; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. Corp.*, 115 Mass. 416, 422.

It is in this sense that the observations found in some of the authorities are to be understood. So understood, the language of the opinion in *Messenger v. Pennsylvania R. Co.*, 37 N. J. Law, 531, is apposite:

"The business of the common carrier is for the public, and it is his duty to serve the public indifferently. In the very nature, then, of his duty, and of the public right, his conduct should be equal and just to all. * * * A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right."

In the same sense the remarks of the court in *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, S. C. 13 Amer. Rep. 72, are approved and adopted as pertinent to the case in hand. The court says:

"And as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together, nor one alone, can directly or indirectly deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. * * * A denial of the entire right of service by a refusal to carry differs, if at all, in degree only, and in the amount of damage done, and not in the essential character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special, by refusing to carry for one person or his goods; whether it is direct, by expressly refusing to carry, or indirect, by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character,—the right denied is one and the same common right which would not be a right if it could be rightfully denied, and would not be common in the legal sense if it could be legally subjected to unreasonable discrimination and parceled out among them in unreasonable, superior, and inferior grades, at the behest of the servant from whom the service is due."

In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves it—

self into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but, when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long-continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The defendants assume to justify upon the theory that a carrier may regulate his charges upon the basis of the quantity of goods delivered to him for transportation by different shippers, and that their discrimination against the plaintiff is in substance one made with reference to the quantity of merchandise furnished by them for carriage. Courts of law have always recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried for the shipper, either at a given shipment, or during a given period of time, although public sentiment in many communities has objected to such discriminations, and crystallized into legislative condemnation of the practice. By the English statutes (17 & 18 Vict. c. 31) railway and canal carriers are prohibited from "giving any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, in any respect whatever," in the receiving, forwarding, and delivery of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight. *Ransome v. Eastern C. R. Co.*, 1 Nev. & McN. 63, 155; *Nicholson v. Great Western Ry. Co.*, Id. 121; *Strick v. Swansea Canal Co.*, 16 C. B. (N. S.) 245; *Greenop v. S. E. R. Co.*, 2 Nev. & McN. 319.

These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in determining what charges are reasonable. He may be able to carry a large quantity of goods, under some circumstances, at no greater expense than would be required to carry a smaller quantity. His fair compensation for carrying the smaller quantity might not be correctly measured by the rate per pound, per bushel, or per mile charged for the larger. If he is assured of regular shipments at given times, he may be able to make more economical arrangements for transportation. By extending special inducements to the

public for patronage he may be able to increase his business, without a corresponding increase of capital or expense in transacting it, and thus derive a larger profit. He is therefore justified in making discriminations by a scale of rates having reference to a standard of fair remuneration of all who patronize him. But it is impossible to maintain that any analogy exists between a discrimination based upon the quantity of business furnished by different classes of shippers, and one which altogether ignores this consideration, and has no relation to the profits or compensation which the carrier ought to derive for a given quantum of service.

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

A common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself." NELSON, J., in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. His obligations and liabilities are not dependent upon contract, though they may be modified and limited by contract. They are imposed by the law, from the public nature of his employment. *Hannibal R. R. v. Swift*, 12 Wall. 262. As their business is "affected with a public interest," it is subject to legislative regulation. "In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." WAITE, C. J., in *Munn v. Illinois*, 94 U. S. 113, 134. It is upon this foundation, and not alone because the business

of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation. Illustrations are found in the cases of *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *Hooker v. Vandewater*, 4 Denio, 349; *W. U. Tel. Co. v. Chicago & P. R. Co.*, 86 Ill. 246; *Coe v. Louisville & N. R. Co.*, 3 Fed. Rep. 775.

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of charges paid to obtain the delivery of goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, "as practical and efficient to the ends of justice" as the remedy in equity. *Watson v. Sutherland*, 5 Wall. 74.

The motion for an injunction is granted.

NOTE.

Where such a corporation, as a common carrier of freights, in consideration of the fact that a shipper furnished a greater quantity of freights than other shippers during a given term, agrees to make a rebate on the published tariff on such freights, to the prejudice of the other shippers of like freights under the same circumstances, *held*, such a contract is an unlawful discrimination in favor of the larger shipper, tending to create a monopoly, destroy competition, injure, if not destroy, the business of smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby. Such a contract of discrimination cannot be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined. A discrimination resting exclusively on such a basis will not be sustained. *Scofield v. Lake Shore & M. S. Ry. Co.*, (Ohio,) 3 N. E. Rep. 907.

Discriminations in rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum. *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309.

It is held in *Ragan v. Aiken*, 9 Lea, 609, that in order to secure freight which would otherwise go to a different route, a railroad company may discriminate in rates in favor of persons living at a distance from its route, provided its charges against others

not similarly situated is reasonable. The court say: "Discrimination in rates of freights if fair and reasonable, and founded on grounds consistent with public interest, are allowable. *Herish v. Northern, Cent. Ry. Co.*, 74 Pa. St. 181; *Chicago, etc., R. Co. v. People*, 67 Ill. 11; *Fitchburg R. Co. v. Gage*, 12 Gray, 393. The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others; or, as said by CROMPTON, J., to the plaintiff, upon the trial of such a suit: 'The charging another party too little is not charging you too much.' *Garton v. Bristol & E. Ry. Co.*, 1 Best & S. 112, 154, 165; *McDuffee v. Portland & R. R.*, 52 N. H. 430. In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company. *Ransome v. Eastern Counties Ry. Co.*, 1 C. B. (N. S.) 437; [*Barber v. Brown*,] *Id.* 135. In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in like condition, it may, nevertheless, lower the charge of another person, if it be to the advantage of the company, not inconsistent with the public interest, and based on a sufficient reason."

In *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, it is held that a common carrier is bound to carry for a reasonable remuneration, but is not bound to carry at the same price for all. The court say: "Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the services performed; that the commonness of the duty to carry for all, does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whatever the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the services performed, and that the difference between the charges cannot be the measure of damages in any case unless it is established by proof that the smaller charge is the true, reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligation in this matter must be reciprocal. Where there is no express contract the common-law action by the carrier against the shipper is for a *quantum meruit*, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person, or the usual charge made against many others, (the freight tariff,) is matter of evidence admissible to ascertain the value of the services performed. In every case the legality of the charge is established and measured by the value of the services performed, and not by what is charged another, unless what is charged the other is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears to the value of the services performed as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate; and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of the defendant here, by grant from the state. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge. A statement of inequality does not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed that would authorize a shipper, after being compelled to pay his freights according to established rates, to look around and find some smaller charge for the same service during the same time which may be either as a gratuity, or a sale of services at a non-compensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person."

BANKERS' & MERCHANTS' TEL. CO. OF INDIANA v. BANKERS' & MERCHANTS' TEL. CO. OF NEW YORK.

(Circuit Court, D. Indiana. April 24, 1886.)

1. TELEGRAPH COMPANIES—CONTRACT TO PUT UP WIRES—COMMON-LAW LIEN.

One who, under contract with a telegraph company, has strung wires upon the poles of the company, cannot, without an agreement to that effect, retain possession and assert a lien by turning the ends of the wires into the ground.

2. SAME—LIEN FOR LABOR—REV. ST. IND. 1881, § 5286.

A contractor who is employed by a telegraph company to put on arms and insulators, and string wires on poles, the material to be furnished by the company, at a designated rate per mile, is not an employe within the meaning of Rev. St. Ind. 1881, § 5286, and entitled to a lien for the work so done.

In Chancery. Exceptions to master's report on intervening petition of James E. Vane.

WOODS, J. The two questions presented for decision are stated by the master as follows:

"(1) Mr. Vane, the petitioner, was employed by the telegraph company to put on arms and insulators, and to string six additional wires, (the company having already four wires in use,) on the poles of the company from Freeport junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for \$45 per mile. The company agreed to furnish and deliver to Vane, at the nearest accessible railway stations, all the necessary material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person."

The master is of the opinion that in doing this work Mr. Vane was an employe of the company within the meaning of section 5286 of the Revised Statutes of Indiana of 1881.

"(2) Vane also asserts a right to a common-law lien based upon the following facts, which are not controverted: The contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession until November 20, 1884, when he delivered possession to the receiver, with an agreement that such delivery was not to impair any rights or lien he might then have by virtue of such possession. He had such possession when the order allowing the issue of receiver's certificates was made, and also when the certificates were issued, November 11, 1884. I report and find that, by perfecting his claim for a lien under the statute, Mr. Vane waived the right, if he had any, to assert his common-law lien."

In the opinion of the court, the petitioner had no lien at common law or in equity, and was not an employe of the telegraph company within the meaning of the statute referred to by the master. That statute provides that "the employes of any corporation doing business in this state shall be entitled to have and hold a first and senior lien upon the corporate property, and the earnings thereof, for all work and labor done by such employes for such corporation." To be entitled to the benefits of this statute, and others of like character since

enacted, I think it clear that the employe must have been a servant, bound in some degree at least to the duties of a servant, and not, like the petitioner, a mere contractor, bound only to produce or cause to be produced a certain result,— a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party.

In respect to the sums found due the petitioner, the report is confirmed, but to the allowance of a lien exceptions sustained. *Ordered accordingly.*

TAYLOR and others v. ROBERTSON and others.¹

(*Circuit Court, N. D. Illinois. May 24, 1886.*)

1. EQUITY—PRACTICE—MASTER'S REPORT—EXCEPTION.

Report of master upon question not referred to him by court is erroneous, and subject to exception by party aggrieved.

2. SAME—ERRORS—RESTATEMENT OF ACCOUNT.

Small errors in master's statement of an account held not ground for requiring him to restate account, even in case in which exceptions to his report were sustained on other grounds.

BLODGETT, J. On a former hearing of this case² the question of the complainants' right to redeem the premises in controversy was fully considered, and such right to redeem sustained, and a reference made to one of the masters of the court to state the account between the parties. By the master's report, filed on July 15, 1885, it is found that there was due to the widow, heirs, and representatives of David R. Green, on June 12, 1885, the sum of \$45,641.66 as the amount required to be paid to redeem the property in question from the lien thereon held by the estate of said David R. Green. By a recent order of the court, the master has brought the statement of account to the first day of April, 1886, showing the amount then due the estate of Green to be \$45,342.86. Both complainants and defendants have filed exceptions to the master's report, which have been argued by counsel, and duly considered.

The first exception of the complainant is to the finding of the master that the allegations of fraud in the bill are not sustained by the proof. This exception is, I think, well taken, because the finding is upon a matter not referred to the master to consider or report upon. The only reference to the master was to take and consider proofs upon the question of the amount to be paid by complainant to redeem the premises in question from the lien of the Green estate; all questions as to fraudulent conduct of the defendants, or any of them, having been considered and passed upon at a former hear-

¹ Reported by Russell H. Curtis, Esq., of the Chicago bar.

² 21 Fed. Rep. 209.

ing, and before the reference now in question. The report will therefore be referred back to the master, with directions to strike out from it the clause stating that he finds the principal allegations in the bill sustained by the proof, except the allegation of fraud against the defendants.

All the other exceptions of the complainant refer to the allowance of items of credit to the defendants, the widow, heirs, and trustees of David R. Green. Some of these minor items, such as the charge of \$68.41 for taking possession of the premises in question, and \$163.45 for the costs and expenses of a trustee's sale, are, I think, improperly included in the credits given the defendants, but the amount is too small to justify or require a restatement of the account for the purpose of eliminating these items. In all other particulars the master has, I think, adopted what seems to me to be a just and equitable rule of allowance of compensation towards the defendants, and the complainant's exceptions to the master's report are therefore overruled, saving only the first.

The exceptions filed by the defendants go only to the equities of the case, and after a careful review of the conclusions which I announced upon a former hearing, and notwithstanding a due consideration of the able and carefully prepared arguments presented on the hearing of the exceptions, I still feel compelled to adhere to the decree heretofore entered in the case.

At the late hearing, both complainants and defendants were allowed to amend their pleadings, but these amendments introduce no features in the case which have not been considered on the former hearing, and were allowed for the purpose of more sharply and clearly defining on the record the lines of attack and defense.

The exceptions of the complainants and defendants are overruled, and a decree will be entered allowing the complainants to redeem, by paying the widow and heirs of David R. Green, deceased, or to Messrs. Paddock & Aldis, their solicitors, the sum of \$45,342.86, with interest thereon at the rate of 6 per cent. per annum from the first day of April last, within 90 days from the entry of the decree; and also decreeing that upon the payment of such sum, or, in case said defendants, or their solicitors, shall refuse to receive the same, on the payment of the same into court, the defendants, widow, heirs, and trustees of David R. Green, shall convey to complainants all and each of their respective rights, title, and interest in and to the property in controversy in this case.

UNITED STATES v. PENNSYLVANIA CO., ETC., Ex'r.¹

(District Court, E. D. Pennsylvania. April 30, 1886.)

1. TAXATION—LEGACY AND SUCCESSION TAXES—ACT OF CONGRESS OF JUNE 30, 1864.

While the act of congress of June 30, 1864, relating to legacy and succession taxes, subjected the property of a decedent to lien, it created no personal liability on the part of the legatee.

2. SAME—ACT OF JULY 13, 1866.

The act of congress of July 13, 1866, imposes no liability upon the person having the property in charge until there has been a neglect or refusal to pay, after demand.

Trespass on the Case.

The jury found the following special verdict, April 20, 1886:

"That Willamina E. Smith died domiciled in the city of Philadelphia, in the month of July, 1864, leaving a last will, by which she provided that there should be paid to her nephew, G. Wymberly Jones, afterwards known as G. W. J. De Renne, for his own use, the sum of \$2,000; and to Jane Gray the sum of \$100; and that all her residuary estate, real and personal, should be held by her executor in trust during the respective life-times of her brother, George Washington Smith, and her sister, Juliana Smith, to pay over a moiety of the net income thereof to each, and in trust, upon the decease of each, to pay over the principal of a moiety to his and her issue, if any should then be living, or if there should then be none, to pay over the same to her nephew, G. Wymberly Jones, if he should then be living, and if he should not, to his children, or failing these, to charities; that Juliana Smith died without issue in the year 1867, and George W. Smith died without issue in the year 1876. George W. J. De Renne survived the latter.

"That the personal property of which the testatrix died possessed was worth \$32,435.95. She also died seized of real estate in the city of Philadelphia valued at \$5,000; of real estate in Mifflin county, Pennsylvania, valued at \$1,111.10; and of real estate in Blair county, Pennsylvania, valued at \$300.

"That the testatrix appointed as the executor of her will, her brother, George Washington Smith, and her nephew, George W. J. De Renne; that on the twentieth of July, 1864, letters testamentary on the said estate were granted by the register of wills of Philadelphia county to George W. Smith, who acted as sole executor until his decease, in the year 1876.

"Upon the decease of Juliana Smith, George W. J. De Renne became entitled to a moiety of the personal estate, viz., \$16,624.75, which was paid over to him on the first day of November, 1869, by the said executor. A moiety of the real estate also vested in him in fee. Letters testamentary upon the decease of the said Smith were granted by said register of wills to said De Renne on the twenty-sixth day of May, 1876. On the first day of August, 1876, as such executor, he paid to himself the remaining moiety of said estate.

"That the said George W. J. De Renne died in the month of August, 1880. Letters testamentary upon his estate were granted to the Pennsylvania Company for Insurance and Granting Annuities, to whom letters of administration *de bonis non cum testamento annexo* upon the estate of the said Willamina E. Smith were also granted by said register on the twelfth day of May, 1881.

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

"That the said George W. J. De Renne filed his account, showing the distribution of said estate, in the office of said register of wills, on the sixteenth day of November, 1876. Said account was finally confirmed by the orphans' court of said county on the seventeenth day of October, 1877.

"That no tax was ever paid to the United States on any portion of said estate.

"That the jury are ignorant in point of law on which side they ought, upon these facts, to find a verdict.

"That if the court should be of opinion that the defendant is liable for a tax of two per centum upon the legacy of \$2,000 to George W. J. De Renne, then they find for the United States for the sum of \$40.

"That if the court should be of opinion that the defendant is liable for a tax of six per centum on the legacy of \$100 to Jane Gray, then they find for the United States in the additional sum of \$6.

"That if the court should be of opinion that the said defendant is liable for a tax of two per centum on the legacy of \$16,625, paid to George W. J. De Renne in 1867, then they find for the United States in the additional sum of \$332.50.

"That if the court should be of opinion that the defendant is liable for the tax of one per centum on the life-interest of George W. Smith in the sum of \$22,284, then they find for the United States in the additional sum of \$222.84, making in all the sum of \$601.34.

"But if the court be of the opinion that the defendant is not liable in any amount, then they find for the defendant."

John K. Valentine, for the United States.

John G. Johnson, for defendant.

BUTLER, J. This suit is against the defendant as legal representative of George W. J. De Renne, a legatee under the will of Willamina E. Smith, deceased, who died in Philadelphia, July, 1864. On the facts found by the jury the defendant is entitled to judgment. The statute of 1864, as well as that of 1862, relating to legacy and succession taxes, subjected the property of decedents to lien as therein provided, and specified very particularly the method of enforcing payment. It did not, however, create a personal liability on the part of the legatee. If the act of 1866 is invoked by plaintiff, it is sufficient to say that this act makes the liability of the person having the property in charge, upon a neglect or refusal to pay "*after demand*." The verdict does not show such demand. Whether the statute is applicable, to the legacy and succession taxes need not therefore be considered.

UNITED STATES v. TRUCKS' ADM'R.¹

(District Court, E. D. Pennsylvania. May 4, 1886.)

1. TAXATION—LEGACY AND SUCCESSION TAXES—ACT OF CONGRESS OF JUNE 30, 1864.

The act of congress of June 30, 1864, made legacy and succession taxes a lien on all a decedent's property, and directed the executor or administrator to pay the same to the collector.

2. SAME—SUIT AGAINST EXECUTOR OR ADMINISTRATOR.

The act of congress contains no provision authorizing a suit against the executor or administrator on his neglecting or refusing to pay, but directs that suit *shall* be brought on the lien.

3. SAME—WHO LIABLE TO SUIT.

The provision of the act of congress is that suit *shall* be brought against the individual in possession, and under it no other remedy can be resorted to.

Trespass on the Case.

John K. Valentine, for the United States.

Bernard Gilpin and Samuel G. Thompson, for defendant.

BUTLER, J. This is one of several suits on stale claims for taxes, recently brought in this court. The statute under which recovery is sought was repealed more than 15 years ago, and the alleged rights of the plaintiff accrued several years earlier. The construction of the statute involved might have been of serious importance to the government before the repeal; now it is not. It is unnecessary, therefore, to do much more than say that the plaintiff is not entitled to recover on the facts found by the jury. The statute provided a specific method for collecting tax on legacies and successions. The tax was made a lien on all the decedent's property, and the administrator or executor directed to pay it to the collector. In case he did not, the statute provided that the lien should be enforced by suit against any one having possession, and the property be sold under the judgment. There is no provision for suit against the executor or administrator; and while such suit might be sustained for the failure to pay, in the absence of express provision for enforcing the lien, (before referred to,) under existing circumstances it cannot. The direction is very specific. On the executor's or administrator's failure to pay, it provides that suit *shall* be brought against *the individual in possession* to enforce the lien. The remedy is an ample one, and there is nothing to support an implication that any other was contemplated. Where a statute provides a method for enforcing compliance with its provisions, ordinarily no other remedy can be resorted to.

While I believe the construction indicated to be the only one admissible, I incline to it the more readily because a different construction, at this time, would be likely to result in serious injustice,—or

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

danger, at least, of injustice,—by requiring individuals to pay, from their own private means, moneys which should have been paid from the legacies and distributive shares passing through their hands, and would have been so paid if the proper officers of the government had discharged their duties. Executors and administrators have been allowed to make distribution under decrees of the state courts, (which were supposed to be a protection,) in ignorance of the claims now set up. The case of *U. S. v. Allen*, 9 Ben. 154, did not involve this question, nor was it considered by either counsel or court. The incidental allusion to it in the opinion is wholly unimportant.

In addition to what has been said, it may be worth while to remark that the subsequent statute of 1866 does provide a remedy against the executor or administrator for *willful neglect or refusal to pay*. But no such neglect or refusal has been found in this case.

UNITED STATES v. KELLY, Adm'r.

(District Court, E. D. Pennsylvania. May 4, 1886.)

BUTLER, J. For the reasons given in the opinion this day filed in *U. S. v. Trucks' Adm'r*, ante, 541, judgment must be entered for the defendant on the verdict. While this case arises under the subsequent statute of 1866, the facts found do not bring the defendant within the provision creating personal liability.

LOW v. FISHER.

(Circuit Court, D. New Jersey. May 17, 1886.)

1. ASSUMPSIT—COVENANT—CONTRACT UNDER SEAL—VERBAL ALTERATIONS—INCORPORATION IN CONTRACT OF PROVISION FOR VARIATION.

Verbal alterations of a contract under seal, which materially change its character, make the whole agreement parol, and *assumpsit*, not covenant, is the proper form of remedy for its breach; but the principle is not applicable when provision is incorporated in the contract itself for a variation of its terms, and for ascertaining the new rate of compensation to be *allowed* for such damages.

2. SAME—ARBITRATION—BAR TO ACTION.

Under the circumstances of this case, certain sections of the agreement, which provide that questions of compensation for work not contemplated by the agreement shall be settled by a common arbiter, are conditions precedent that bar recovery unless the declaration contain allegations that they have been performed, or averred sufficient excuse for non-performance.¹

In Covenant. Demurrer.

Kays, Huston & Kays, for demurrer.

Francis J. Swayze, *contra*.

¹ Respecting provisions in a contract for arbitration, and compliance therewith being a condition precedent to a recovery thereon, see *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep. 30, and note, 32, 33.

Nixon, J. This suit was originally brought in the circuit court of the county of Sussex. A general demurrer was put in to the declaration, and, pending the proceedings there for a hearing, the case was removed into this court. The action is in covenant. The declaration contains two counts, assigning two breaches of the contract. The counsel for the plaintiff, on the argument, admitted that the first count was insufficient; but he insisted that the breach in the second count was sufficiently assigned and set forth to sustain the suit.

Two questions have been presented and argued: (1) Whether an action in covenant is maintainable upon a sealed instrument, when the terms of the contract have been subsequently and materially modified by parol. (2) Whether certain sections of the agreement, which provided that questions of compensation for work not contemplated by the agreement should be settled by a common arbiter, were conditions precedent that barred recovery unless the declaration contained allegations that they had been performed, or averred sufficient excuse for non-performance.

1. It seems to be now understood that verbal alterations of a contract under seal which materially change its character, make the whole agreement parol, and that *assumpsit*, and not covenant, is the proper form of the remedy for its breach. But the principle is not applicable when provision is incorporated in the contract itself for a variation of its terms, and for ascertaining the new rate of compensation to be allowed for such changes. In the present case the contract was for grading and for the masonry on certain specified sections of the New Jersey Midland Extension Railroad, for definite prices, the work to be executed under the direction of the chief engineer of the Scranton Construction Company, and whose determination of all questions arising between the parties should be final and binding upon them. Provisions were made in the contract for varying the work to be performed, in the discretion of the engineer, and for determining the rate of payment to be allowed for the changes. In the recent case of *Hamilton v. Hart*, 1 Atl. Rep. 254, the supreme court of Pennsylvania carefully considered this question, and, following *Carrier v. Dilworth*, 59 Pa. St. 406, held that covenant, and not *assumpsit*, was the correct form of the action in cases where a contract under seal had been varied by parol agreements, unless the changes in the contract were so radical as to make substantially a new contract. I do not find any such radical changes in the present case, and must hold that the action is properly brought.

2. The second count of the declaration is founded upon the eleventh section of the contract, which provides "that changes in the alignment, gradients, and forms of structures may be made at the direction of the chief engineer; but no claims for damages shall be made or allowed therefor, nor for any prospective profits or work, which may, by reason of such changes, be abandoned; but any work done upon the line before it is changed, and which may be abandoned,

shall be paid for at the prices fixed in this contract; and when the new alignments, gradients, or forms of structures substituted for those abandoned shall, in the opinion of the chief engineer, materially alter the character of the work, he shall estimate the difference in value thereof, and due allowance shall be made therefor, according to the enhanced or diminished value of the work." From the terms of the section it is manifest that, before a suit can be maintained for a breach of the same, two things are necessary: (1) That the chief engineer should be of the opinion that the changes made in the alignment, gradients, and form of structures have materially altered the character of the work; and (2) that he shall have estimated the difference in value. The declaration contains no allegations that the chief engineer had any such opinion, or that he has made an estimate of the amount of the enhanced value of the work. On the contrary, it simply alleges "that he has wholly neglected and refused so to do." This is hardly sufficient. *Non constat* that the facts and circumstances of the case did not justify his neglect and refusal. As was pertinently observed by ERLE, C. J., in *Clark v. Watson*, 18 C. B. (N. S.) 278, when considering a demurrer to a declaration in a very analogous case: "This is an attempt on the part of the plaintiff to take from the defendant the protection of his surveyor, [or arbiter,] and to substitute for it the opinion of a jury."

It is not necessary to say whether the count would have been good if it had alleged that the neglect and refusal of the chief engineer was fraudulent or in bad faith, but the count, in its present form, cannot be upheld, and the demurrer must be sustained.

GAITHER v. KANSAS CITY, ETC., R. Co.

(Circuit Court, W. D. Tennessee. May 22, 1886.)

1. NEW TRIAL—INADEQUATE VERDICT FOR DAMAGES.

The rule that the court will not set aside a verdict because of a difference of opinion as to the amount of damages that should have been allowed, is consistently adhered to, and a new trial may be granted, where the judge is not satisfied that the jury acted with full comprehension of the force of the proof and of the charge of the court upon a matter in dispute.

2. SAME—CASE IN JUDGMENT.

Where the jury found a verdict of \$250 for personal injury, resulting in the death of a young colored girl, in a suit by her father for his pecuniary interest in her life, and there was an issue whether the parties were domiciled in Arkansas, where a female becomes of age at 18 years, or in Tennessee, where she is not of age until she becomes 21, and upon this issue the proof was unsatisfactory, and the court was not satisfied that its charge was sufficiently definite on the point, a new trial was granted.

3. NEGLIGENCE—ACTION FOR, CAUSING DEATH—MEASURE OF DAMAGES.

Under the Arkansas statute, and those like it, allowing damages for negligence resulting in death, only the pecuniary interest of the plaintiff can be recovered; and this may be even less than \$250, under some circumstances,

when we discard the sentiment that any human life is worth more than such a pittance as that, which sentiment the law does not at all recognize as an element of damages; nor any idea of punishment for the negligence.

4. CARRIER—WHO IS A COMMON CARRIER—SKIFF IN THE MISSISSIPPI RIVER.

Whether a skiff carrying an occupant for pay is a common carrier, in the sense of the rule that in case of collision a passenger is not responsible for the negligence of his own carrier, *quære*.

Motion for New Trial.

The plaintiff's child, a colored girl about 16 years of age, was killed by collision with the defendant's transfer boat in the Mississippi river, near the Arkansas shore, soon after the boat had left the incline of the railway. She was one of the occupants of a skiff coming from a cotton plantation, and had paid the skiffman for her passage, as many persons did who came in that way to Memphis, the skiff being kept at the plantation for that purpose. The steam-boat and skiff came into collision under circumstances enabling them to set up negligence against each other, but it is not necessary now to state the circumstances. The jury found a verdict for \$250 for the plaintiff; the court having charged them that the plaintiff and his child were not responsible for any contributory negligence of the skiffman.

Smith & Collier, for the motion.

Newman Erb, contra.

HAMMOND, J. This case presents a question whether persons riding in skiffs on the Mississippi river are "passengers," and the skiffs "common carriers," in the sense of the rule that the passenger is not responsible for the negligence of his carrier in cases of injury by collision. It was ruled in favor of the plaintiff at the trial, but with considerable doubt, particularly in view of the case of *Collins v. Davidson*, 19 Fed. Rep. 83. It is true, it is not shown whether the plaintiff in that case was a "passenger" with respect to the fact that he was being carried for pay; but it may be doubtful whether there is not, even where they are carried for hire, an element of foolhardiness in riding in a skiff in the neighborhood and close proximity of passing steamers on this river, that precludes the notion of treating the skiffs as carriers, and assimilating them to carriages on land. It does not now require decision here, for the defendant makes no complaint of the verdict, and on the plaintiff's motion for a new trial the sole question is whether the court should set the verdict aside for inadequacy. It stands precisely upon the same footing as a motion made to set aside a verdict for excessive damages. In neither case should a court substitute its judgment for that of the jury. *Brown v. Memphis, etc., R. Co.*, 7 Fed. Rep. 51; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Muskegon Bank v. Northwestern Ins. Co.*, 19 Fed. Rep. 405; *Lancaster v. Providence, etc., Co.*, 26 Fed. Rep. 233.

This was an action for a personal injury resulting in the death of a colored girl about 16 years of age, brought by her father; and the sole

question, under the charge of the court, as to which no exception was taken, was the extent of his *pecuniary* interest in her life. It was urged by defendant that they were citizens of Arkansas where the injury occurred, and under the statute of which state the suit was brought. There she became of age at 18, and it was argued to the jury that he had only a right to her prospective earnings for two years. It was claimed by the plaintiff that they were citizens of Tennessee, sojourning in Arkansas to work on a plantation. In Tennessee the child would not become of age until 21. This question of citizenship was submitted to the jury, and no exception is taken to the charge on that score; but it is said that the jury possibly did not understand it. I think they did fully, for it was a very intelligent jury. But the proof itself was far from satisfactory, as, perhaps, it might always be with a class of people who are wanting in many of the possessions and situations in relation to which satisfactory circumstances are found to determine a question of domicile or citizenship. I am unable to even guess from the proof, and we can look nowhere else, how the jury arrived at this verdict; but here, again, the trouble is that in all such cases it is impossible to calculate the damages with accuracy from any proof. It is largely a matter of estimation by the jury from the proof, and not calculation.

I wish to avoid wholly a determination of this motion upon the purely sentimental argument that any human life is worth more than \$250. The most valuable of lives, the lives of the grandest of men and women, may be worth less than that sum, in an action under Lord CAMPBELL's act, and those of our states, like that under which this suit was brought. A plaintiff may have had less than \$250 *pecuniary* interest in the life of any decedent. The sentiment relied on so earnestly here is not at all an element in the action. Nor is the notion of punishment for the negligence. The court so told the jury, and confined them strictly to the cold estimate of pecuniary interest, and I think that is the law. *Lett v. St. Lawrence, etc., R. Co.*, 11 Ont. App. 1; *S. C. 21 Amer. & Eng. R. Cas.* 165. This is one of the most instructive cases on this subject, and represents the general law, as I understand it, everywhere that these acts have been passed. *Little Rock, etc., R. R. v. Barker*, 39 Ark. 491; *St. Louis, etc., R. Co. v. Freeman*, 36 Ark. 41.

Yet I do not feel content with this verdict; and, while discarding the argument just considered, leaving to the jury its fullest power, and adhering to what I have so often ruled about substituting the judgment of the judge for that of the jury, I fear the verdict may be the result of misapprehension of the force of the testimony on the subject of domicile. If the parties resided in Arkansas, the verdict might be reasonable enough; while if they resided in Tennessee, it might not be adequate. The impression made on my mind by the proof, inadequate as it was, was that with this class of people, going from plantation to plantation to work in the cotton fields, they were,

on the circumstances proven, legally Tennessee people, temporarily in Arkansas. And here the question arises whether the damages should be calculated, so far as they can be subject to calculation at all, according to the Tennessee law, or that of Arkansas, by whose gracious statute any damages are recoverable at all. I thought they might be given according to the Tennessee rule of nonage, but was not sure of it, and am not now. I fear the jury may have been misled by instructions on that point not sufficiently definite. I was not very certain about it, and perhaps the jury were as uncertain after the charge as the court was.

In *Armstrong v. Haley*, 4 Q. B. 917, there was a verdict of £10 for a broken thigh, and the court granted a new trial, saying: "A new trial on a mere difference of opinion as to amount of damages may not be granted, but here are no damages at all." I do not think that is this case, for, sentiment aside, a father may have a very small pecuniary interest in the life of a young girl, much less than one may have in an uninjured thigh; but I feel here that possibly there may not have been given enough by the jury through my own fault, although counsel have been kind enough to say that they take no exception to the charge.

Again, the impression made on my mind at the trial, and by a careful subsequent reading of the proof, is that the verdict ought to have been for the defendant on the issue of negligence, and I have thought it possible the jury gave this verdict as a mere *solatium* through sympathy for this poor man. If the defendant had asked a new trial, I should grant it on the ground that such was a possible outcome of the trial. I would not set aside the deliberate verdict of a jury on the proof here concerning negligence, either way, for that is the function of the jury to determine; and, although there is this suspicion that they gave a gratuitous *solatium*, I must take it on this motion as conclusively established by their verdict that there was negligence. And I recognize as wise the policy of the defendant to accept the verdict and pay it, rather than go to the expense of a new trial; but at the same time, as the court would have found the fact of negligence for defendant, and the jury, whose province it was, has found it for the plaintiff, and has given a verdict which may have been the result of misapprehension as to proof that was inadequate, and of the charge of the court on that point, there is on my part a doubtful state of mind, which seems to me, when there is no writ of error, and this court must finally determine the case, to make it just to both parties to try the case over again before another jury. It is, at last, at this point that the judge may and should resort to his power to grant a new trial with that mobility of judgment which comprehends within the exercise of sound discretion a reasonable departure from any fixed rule of decision,—and there can be no very fixed rule of judgment in such matters,—and at the same time a consistent and strict adherence to the principle of permitting issues of fact to be once, and once only,

fairly and legally tried, in good faith, by the jury, and not by the court, as our constitution and laws require.

New trial granted.

In re BURT.

(District Court, N. D. New York. May 20, 1886.)

1. **BANKRUPTCY—ASSIGNEE'S COMMISSION—RETENTION OF FUNDS.**

The assignee may retain from the funds in his hands the amount of fees and commissions earned; but cannot retain a sum to meet any additional allowance the court may see fit to grant.

2. **SAME—DEPOSIT IN BANK—LOSS OF INTEREST.**

Where the assignee fails to deposit moneys received in bank, he is liable to the estate for any interest lost through such failure.

In Bankruptcy.

In May or June, 1884, the assignee received, on account of the estate, \$5,478. On the fifteenth of October, 1884, he deposited \$4,563 in the bank designated by the court. At the third meeting of creditors the amount received by him in excess of the sum so deposited was ascertained to be \$995, and the amount due him for commissions, etc., was adjusted at \$419. The creditors now move that the assignee be required to deposit \$995, with interest at the bank rate of $3\frac{1}{2}$ per cent. per annum; and also the interest upon \$5,478 during the interval it remained in his hands. The motion is resisted upon the ground that the assignee was justified in retaining a sum sufficient to pay his commissions, the current expenses of the trust, and any additional allowance which the court might see fit to grant.

Elisha B. Powell, for the motion.

William Tiffany, opposed.

Coxe, J. The position of the assignee is not tenable. He could, without impropriety, retain the amount of fees and commissions earned; but it was not permissible for him to appropriate several hundred dollars upon the supposition that the court might sometime in the future award an extra allowance for his services. Care has been taken in the selection of suitable depositories in which all moneys received by assignees in bankruptcy shall be deposited. The only prudent course, therefore, is for the assignee to follow the rules laid down for his guidance. The proposition that the sum retained was needed for current expenses is sufficiently answered by the undisputed allegation that it has not been so used, but, on the contrary, the expenses of the trust have been uniformly paid from the funds in the bank.

The proof fails to show bad faith upon the part of the assignee. It does show, however, that the creditors have lost a certain amount of interest by reason of his action. The estate, and not the assignee,

is entitled to what the fund can earn. It follows that the assignee should forthwith deposit in the First National Bank of Oswego, New York, the sum of \$576, with interest thereon at the rate of $3\frac{1}{2}$ per cent. per annum from the fifteenth of October, 1884; also interest upon \$5,478 from the date of its reception by him until October 15, 1884. There being some dispute between the parties as to dates, etc., the computation may take place under the supervision of the register in charge, to whom it is referred for that purpose.

In re BURT.

(*District Court, N. D. New York. May 20, 1886.*)

BANKRUPTCY—ASSIGNEE'S FEES—EXTRAORDINARY AND UNUSUAL DUTIES.

The court having examined *de novo* an application by the assignee for an additional allowance in respect of extraordinary and unusual duties, followed the report of the register giving an additional allowance, although it had not been filed or excepted to, on the ground that the opinion of the register, who had personal knowledge of the matters in controversy, was entitled to great weight, and the court did not feel justified in disturbing it.

In Bankruptcy.

On the ninth day of March, 1886, a motion being then pending for an additional allowance to the assignee, the issues involved were, by consent of all parties, duly referred to the register in charge. The order recites "that the petition, and the subject-matter thereof, and the entire subject of compensation of said assignee, be, and the same hereby is, referred to Hon. C. CARSKADDAN, register in bankruptcy, to hear and examine into the same, and report thereon in full to this court, with his opinion." The register heard the parties, and reported that \$250 is a reasonable sum to be allowed for the extraordinary and unusual duties performed by the assignee. The report concludes as follows: "I think the sum of two hundred and fifty dollars would be a just and fair allowance, under the circumstances of the case, and hereby order and direct that the assignee be allowed that sum as extra compensation in the above matter." No exceptions to the report, as required by rule 17 of this court, have been filed, nor is any evidence presented that the report itself has been filed. All the papers and written briefs have been sent to the court upon the theory entertained, apparently, by both counsel that the whole subject is open for discussion, and that the reference to the register was a perfunctory and formal proceeding. The bankrupt and the creditors insist that the assignee should receive nothing. The assignee, on the contrary, contends that he is entitled to double the sum awarded by the register.

William Tiffany, for the assignee.

Elisha B. Powell, for the bankrupt and creditors.

COXE, J. All the parties interested—the creditors, the assignee, and the bankrupt—consented that the entire subject of compensation to the assignee be referred to the register in charge. He heard the parties at length, and made his report, awarding \$250 in view of the protracted and successful litigation carried on by the assignee. The report has not been filed or excepted to. Though technical objections might be urged to this manner of presenting the case, I have, under the provisions of general order No. 30, considered it my duty to examine the question *de novo*. The opinion of the register, who for some time has had personal knowledge of the matters in controversy, is entitled to great weight, and, in these circumstances, I do not feel justified in disturbing it. The finding of the register that, in addition to the ordinary and usual duties in such matters, the assignee “was engaged in litigation from the beginning of his trust (October, 1877,) until May, 1884, and in such litigation succeeded in reducing a claim upon the assets of the estate from \$32,000 to about \$300,” seems to be fully sustained by the proof, and is sufficient to justify the granting of the small allowance reported by him.

The report of the register is confirmed, and, with the concurrence of the circuit judge, an additional allowance of \$250 is awarded to the assignee.

OTIS BROS. MANUF'G Co. and others v. CRANE BROS. MANUF'G Co.¹

(Circuit Court, N. D. Illinois. March 22, 1886.)

1. PATENTS FOR INVENTIONS—PATENTEE BOUND BY HIS CLAIMS.

Letters patent No. 44,740, of October 18, 1864, to Charles R. Otis, must be limited to the peculiar arrangement which patentee describes; he having acquiesced in the rejection by the patent-office of broad claims.

2. SAME—NEW COMBINATIONS OF OLD MECHANISMS.

The fact that patentee produced an old result by a more effective combination of old elements is no reason why defendants should not be allowed to make new combinations of such elements to produce the same result, so long as they do not use the combination of parts claimed by complainants' patent.

3. SAME.

Patent No. 44,773, of May 18, 1865, is a mere improvement upon the principle shown in the English patent of Gidlow, 1858, and of Law, 1861; and as the defendant was also an improver upon old devices in this art, *held*, that the readier and more natural conclusion was that defendants' improvement was not the same combination of devices that was shown in and covered by complainants' patent.

4. SAME—CONDITIONAL ASSIGNMENT OF PATENTS—PARTIES.

Where owners of patents had granted the entire interest in them for certain territory, but upon certain conditions which grantees were to perform, and, upon failure to perform, the title was to revert to grantors, *held*, that grantor's title was never fully divested, or at least they had a possible reversionary interest, so that it was proper to join them as complainants in a suit for infringement of the patents within the territory covered by the grant.

In Equity.

Offield & Towle, (Mr. Phillips, of counsel,) for complainants.
West & Bond, for defendants.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

BLODGETT, J. The bill in this case alleges infringement by defendants of patent No. 44,740, granted October 18, 1864, to Charles R. Otis, for "an improvement in brakes of hoisting apparatus," and patent No. 44,773, granted May 18, 1865, to said Charles R. Otis and Norton P. Otis, for an "improvement in steam-hoisting apparatus," and asks for an injunction and accounting.

The principal controversy centers about the patent No. 44,740, and this patent will be first considered. The patentee in his specifications says of this device:

"This invention consists in so combining the brake of a hoisting-machine with the stop-valve of the hoisting engine that, when the said valve is closed, and the steam or other motive fluid shut off from the engine, the brake is always in operation, and, when the valve is open to admit steam or other fluids to the engine, the hoisting engine is relieved of the friction of the brake."

The patent contains but one claim, which is: "The combination and arrangement of levers and connections substantially as herein described, whereby the brake is automatically applied while the valve is closed, and withdrawn when the valve is open to set the apparatus in motion."

The parts of this device operating together as contended by the complainant to produce the stated result, are: (1) A stop, start, and reverse valve to a steam-engine; (2) a lever by which said valve is worked; (3) a rod attached to the end of such lever, the upper end of which is toothed; (4) a small pinion, turning freely upon a fixed stud or axle so located, in relation to the toothed rod, that the teeth of the rod may be made to engage with the teeth of the pinion, and, by turning the pinion in the different directions, the valve lever is moved to open, shut off, or reverse the steam; (5) a pulley affixed to this pinion, around which passes a belt by which the pinion can be turned; (6) a friction wheel attached to the winding drum of a hoisting apparatus, upon which is a band-brake; (7) a lever to work the brake, the end of which is weighted with a weight sufficiently heavy to set the brake, or a lever with toggle-joints to set the brakes; (8) a pulley which is fastened to the side of the pulley which works the valve lever, so that when the pulley that works the valve lever is revolved it will also revolve this side pulley; (9) a chain connecting the brake lever with this side pulley, so that when the pulley that works the valve lever is turned, it will wind or unwind the chain attached to the brake lever, and thereby release or set the brake. Simply stated, the valve lever and the brake lever are both attached to a pulley which is moved by a belt, and the parts are so arranged that when the valve is closed, the weight upon the end of the brake lever is acting to set the brake, and when the valve is open, by revolving this pulley, it releases the brake.

The defense is, in effect, prior use of the devices here claimed, and a denial of the alleged infringement, and the testimony and arguments of counsel have taken a wide range in regard to the state of the art

and mode of operation of many older devices for the same or analogous purposes. The defendants use a device whereby the brake is set when the valve is closed, and released when the valve is open. The combination of parts to produce this result in the defendant's machine is stated by the defendants' counsel to be: (1) A start, stop, and reverse valve; (2) a lever attached to the stem of this valve, by which the valve is moved into the required position for starting, stopping, and reversing; (3) a friction wheel attached to the winding shaft of a hoisting engine with a band brake; (4) a lever by which this brake is operated, one end of which lever is weighted, and rests in a notch in a two-way or heart-shaped cam; (5) a rod connected at the upper end with the valve lever, and at the lower end eccentrically with the cam on which the end of the brake lever rests,—all so arranged that when the valve is closed, the brake is set, and the end of the lever rests in the notch of the cam; but when the valve is open, either to start or reverse, the brake is released by the turning of the cam so as to lift the weighted end of the brake lever.

Although the Otis claim speaks "of the arrangement of levers whereby the brake is automatically applied," yet it is evident that neither of these devices of the complainant or defendant are automatic,—that is, they are not self-acting, and put in operation from within the machine itself, but must be put in action by the person in charge of the machinery,—and the operation of the parts in both machines is such that both the brake and valve levers act simultaneously, by one movement from the operator in charge. The chief use to which both complainants' and defendants' machines have so far been applied is in running elevators or lifts, in which, by means of a shipping rope or chain connected with the part which controls the brake and valve levers, the movement of the machinery is controlled from the cab or cage; and the advantages claimed for the device covered by complainants' patent are that, in case of accidents to the brake, the cage can be stopped by stopping the engine, because the engine is connected directly with the drum, and this stopping can be performed by moving the valve into its intermediate position, or, if the weight is too heavy upon the cage, the valve can be reversed the same as a lever in a locomotive, when it is desired to suddenly stop. It also permits the operator to slow up, and to reduce the speed of the cage as he approaches the floor where he desires to stop, either in going up or coming down; also that the engine is not used, and steam not expended, unless work is done, and the cage moved up or down; that is, the engine is stationary, and steam is only used when the cage is moving.

The proof shows many old devices for hoisting apparatus applied to raising ores and coal from mines, and also one old passenger elevator, (see Knight, Mechanical Dict. tit. "Hoisting Engines;") and since the introduction of the steam-engine several arrangements by which the brake and valve can be operated simultaneously are shown by the proof. The English patent granted to Robert Cameron, in

1789, for hoisting apparatus, shows such an arrangement of valves and brake levers that the engineer in charge of the engine could release the brake and open the valve, or close the valve, and set the brake, simultaneously, the two levers not being actually connected, but being arranged so near together that both could be actuated at substantially the same time. The English patent of 1856 to Rossum shows a device for the purpose of applying a brake, and at the same time cutting off the steam; but it is urged that this was only a danger device, to be resorted to in an emergency or peril, and not for the purpose of controlling the ordinary operation of the machine. So, too, the English patent of 1857 to James Robertson showed a start, stop, and reverse valve, operated by a lever, to which was connected a brake mechanism so arranged that when the valve was closed the brake was set, and when the valve lever was moved into position to open the valve it released the brake. When the valve was closed it set the brake, and when the valve lever was moved to reverse, the brake was released. The mechanism shown in that patent is very complicated; yet, if not as simple and as effectual as the Otis device, it seems to have accomplished all that he did; that is, it opened the valve and released the brake, and closed the valve and set the brake, by the movement of one lever. It allowed the basket or cage to be stopped at any point in the ascent or descent, and enabled the operator to control the motion so as to run fast or slow, and the movement was stopped by shutting off the steam and applying the brake, so that the steam was not used while the movement of the weight was arrested. So, too, in the English patent of 1861 to Walmsley & Rostrom, a device is shown for automatically stopping the hoisting apparatus in a warehouse or building at any floor or story of the building, without the aid of an attendant, so, as I understand its operation, the cage or platform could be loaded at the lower floor and sent up to any desired upper floor, to be unloaded, without an operator to accompany it; and in the specifications these patentees speak of "the ordinary stopping rope" as if that were then a well-known device for controlling the movement of a hoisting apparatus.

The testimony further shows that E. G. Otis, the father of C. R. Otis, the patentee, was for many years prior to his death, which was in April, 1861, engaged in and near the city of New York in constructing and putting in operation hoisting-machines or elevators, for transporting passengers and merchandise between the different floors of factories, warehouses, stores, etc.; that in January, 1861, he took a patent in this country for a device by which the brake could be applied and the operating power suspended simultaneously by means of a forked rope, one end of which operated the brake lever and the other operated a shipping shaft, so as to throw the hoisting belt onto a loose pulley, this forked rope extending to the cage, and by means of which the movement could be controlled from the cage. It also

appears that in the fall of 1860, and the winter of 1861, E. G. Otis constructed three elevators in the warehouse of H. B. Claflin & Co., in the city of New York, in two of which, according to the testimony of Mr. C. R. Otis, the shipper rope was passed around a pulley working upon a shipper shaft, on which pulley was a pinion, which worked a toothed rod or rack connected with the valve lever, so that the valve was opened, shut, and reversed by the co-action of the same parts that open, shut, and reverse the valve in the patent now under consideration.

There is also considerable testimony in the defendants' record tending to show that the valve and brake in each of these elevators were so connected that when the endless rope or chain in the cage was pulled down or up, it opened the valve and the brake at the same time, by one movement. But, without considering or attempting to decide the question as to where the weight or preponderance lies, between the conflicting testimony as to whether or not either of the Claflin elevators were controlled by one chain or rope, which opened the valve and brake together, it is sufficient for the present to say that all the advance C. R. Otis made in the art was to improve the device used by his father, by connecting the weighted end of the brake lever with the pinion which actuated the valve lever, so that when the pulley was revolved by the belt or shipping rope for the purpose of opening the valve either to start or reverse it also lifted the weighted end of the brake lever, and released the brake. In other words, he merely made the pulley, *f*, and fastened it to the side of the pulley, *c*, of the valve-operating device, and connected the end of the brake lever with this new pulley, *f*, by the chain, *e*. All the other operative parts which complainants' counsel insist are called for by the claim of the patent were in the Claflin elevators, and designed and constructed by Mr. E. G. Otis; and the proof also shows that when C. R. Otis applied for his patent he claimed particularly: "So combining the brake of a hoisting apparatus with the stop-valve of an engine by which it is worked that when the said valve is closed the brake is in operation, and when the said valve is open the hoisting-machine is relieved of the friction of the brake, substantially as herein stated." His application with this broad claim was rejected, and it was decided by the commissioner of patents that he could only have a patent for his "peculiar arrangement." He acquiesced, and took his patent for "the combination and arrangement of levers and connections, substantially as herein described." His patent is not, broadly, for applying the brake automatically while the valve was closed, and releasing it when the valve was open; because he had applied for such a broad claim, and it had been denied, and he had been told that he could only have a claim on his "peculiar arrangement," and his claim is limited to such arrangement.

"In patents for combination of mechanism, limitations and provisos imposed upon the inventor, such as were introduced into an

application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers." *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63; S. C. 5 Sup. Ct. Rep. 1021; *Dodds v. Stoddard*, 17 Fed. Rep. 645; *Manufacturing Co. v. Corbin*, 103 U. S. 791. "It is well known that the terms of the claims of letters patent are carefully scrutinized in the patent-office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous inventions and the state of the art, determines the applicant is entitled to. The courts, therefore, should be careful not to enlarge by construction the claim which the patent-office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms." *Burns v. Meyer*, 100 U. S. 672.

If this patentee had described the state of the art upon which he wished to engraft his improvement, he would have said, in substance: "I have connected the valve levers and the brake lever of the E. G. Otis machines, by means of the pulley, *f*, and the chain, *e*, so that the valve and the brake can be simultaneously worked by one movement of the shipper belt; the shipper belt having formerly worked the valve only." Read in the light of the proof in this case, it seems to me all that this inventor did which had not been done by his father, and immediate predecessor in business, was to connect the brake and valve attachments together by his peculiar mechanism; for he was not the first to connect the valve of a steam-engine with the brake of the hoisting apparatus, so that the brake would be open when the valve was opened, and closed when the valve was closed; as Robertson, in his patent of 1857, had shown how that could be done in two ways; and in the Clafin machines 2 and 3, according to the testimony of Mr. C. R. Otis, the steam could be shut off and the brake applied by pulling down the two ropes at the same time; and it would seem, also, from his testimony that the two ropes were placed near together, so as to enable them to be pulled and the brakes and valves closed at substantially the same time.

Looking upon this patent, then, as limited to the peculiar arrangement of parts shown, and not to the results produced,—for such results were not new,—the question is, do defendants use the combination or arrangement of parts shown in the patent, or known equivalents, for performing the same function? The defendants' valve-actuating mechanism consists of a valve lever, movable up and down from its central or closed position by an endless rope or chain. There is no rack or pinion movement, and no belt around a pulley. The endless rope attached to the lever is simply pulled up and down to start, stop, or reverse, without the intervention of the rack, pinion, or pulley, substantially as shown in complainants' model Clafin machine Nos. 2 and 3. Defendants' brake lever is operated by a cam, to which motion is communicated by means of a rod from the valve lever, combined with a peculiar safety device for setting the brake in

case of a break of the driving belt; and while it may be said that all these parts co-operate to produce the same result produced by the Otis device, yet they are not the same elements, and do not operate together in the same manner. It does not seem to me that the defendants' heart-shaped cam can be held to be a mechanical equivalent for the complainants' pulley, *f*, and the chain, *c*, or the toggle joint. The whole arrangement of parts seems to be much more simple, and consequently more reliable in practical use, than that shown by the patent. Starting, stopping, and reversing valves of various forms, with levers to work them, being old, and there being old devices for connecting these valve levers with brake mechanisms of hoisting apparatus, whereby the brake was applied when the valve was closed, and released when the valve was opened, these defendants had the same right to improve this old mechanism as had the patentee. The fact that he produced an old result by a less complex, and consequently more effective, combination of old elements, is no reason why defendants should not be allowed to make new combinations of these old levers, rods, and cams to produce the same result, so long as they do not use the same combination of parts shown by the patent to effect the same result.

It seems to me that Mr. Otis, and those who preceded him, started with a lever to a start, stop, and reverse valve, and a brake lever working a hand-brake upon a hoisting-drum; and the problem they sought to work out was, first, to actuate the valve and the brake lever from the cage, so as to control the movement of the cage. This was accomplished in two ways by the elder Otis, and then Mr. C. R. Otis attempted the further problem of connecting the valve and brake levers together, so that they co-operated to produce the result of setting the brake when the steam was shut off, and opening it when the steam was let on. The defendant started with the same old parts,—the valve lever and brake lever,—and worked out the same result by different instrumentalities, dispensing with chains, links, ratchets, pinions, and pulleys, which were used by the complainant; thereby, as it seems to me, fairly and meritoriously avoiding the complainant's patent by not using the complainant's combination to produce the same results. It therefore seems to me, the defendants do not infringe patent No. 44,740.

Patent No. 47,773 is for a stopping device used to stop the cage at the top and bottom of the shaft. It is what is known in mechanics as a "limit stop," and is arranged to work automatically, to shut off steam at the top and bottom of the shaft if the operator becomes careless and neglects to do so. It consists chiefly of a shaft on one end of which is a screw thread, which is traversed by a nut with a tail or projection upon it. This tail or projection is carried or runs, for a portion of the distance, in a slot, so that as the shaft is revolved the nut travels in the slot, motion being given to the screw thread by a bevel-gear attached to the same shaft that carries the

hoisting drum. The parts are so arranged as that the nut shall traverse the screw to a certain point during the time the cage is passing from the bottom to the top, or from the top to the bottom, of the building. When this nut reaches the limit point, it locks the shaft so as to revolve it, and engage with the bevel-gearing, which works in connection with the valve lever so as to close the valve of the engine. It does not effect the brake mechanism, and neither sets nor opens the brake. The claim is: "Combining the stop-valve of the engine with the valve of the steam hoisting apparatus in the shaft of the main drum; or with any other shaft or counter-shaft of the hoisting apparatus, by means of a stop motion, constructed, applied, and operating substantially as herein specified."

Defendants use two circular plates laid together, with a spiral channel cut on the inner face of one, in which a stop travels as the outer plate is rotating, and when the stop reaches the end of the spiral groove it locks both plates, and moves a rod connected with the valve lever so as to cut off the steam. If the complainants' patent could be said, in any sense, to be a bottom or foundation patent, I should be much inclined to the conclusion that the spiral channel in defendants' plate, with the traveling stop, is the equivalent for the screw shaft and traveling nut of the complainants' patent; but the complainants' patent seems to me a mere improvement upon the principle shown in the English patent of 1858, of Gidlow, and Law's English patent of 1861. In fact, it seems but little else than an adaptation of Law's device, as shown and described in his patent, to the peculiar mechanism of the complainants' elevator. Law says in his specifications:

"My invention is intended to prevent the overwinding of Pits' cages, and the sad accidents resulting therefrom. It consists of a screw-shaft, which may be a continuation of the driving or any other shaft, in connection with the engine employed in winding. The said screw-shaft is furnished with a suspension lever, through one end of which it works; but the other end being free, the said suspension lever hangs down vertically from the said screw-shaft, and is caused to traverse the same backwards and forwards from end to end, as the shaft is turned in either direction. The distance it is allowed to traverse the said screw-shaft is regulated by set-nuts, or otherwise, in accordance with the length of rope to be wound from the pit. It will readily be understood that when the engine is started the said suspension lever is caused to traverse the said screw-shaft by its turning until it arrives at one end of the same, when it is at once brought to a stop by coming in contact with a collar or set-nut, which lifts it, and causes it to strike simultaneously against catches or stops on the ends of two horizontal levers, one of which is connected with and puts on the engine brake, and the other, being in connection with the slide-valve, shuts off the steam or reverses the engine."

In the light of this description of the Law patent, there can scarcely be a serious doubt that its principle and mode of operation is substantially the same as that of the complainants' patent; but, inasmuch as both the complainant and the defendant in this case seem to me to occupy the position of improvers upon old devices in hoisting-

machines, the readier and more natural conclusion is that defendant's improvement is not the same combination of devices as the complainant's, and does not show the same kind of stop devices that is shown and covered by complainant's patent.

Soon after this bill was filed, and before defendants had answered the same, a demurrer was interposed raising the question of misjoinder of the complainants. The suit is brought by the Otis Bros. Manufacturing Company of New York, and the Smith, Beggs & Co. Machine-works of St. Louis, as joint complainants. It was urged in this demurrer that there was no such showing in the bill as entitled these parties to join in this suit. I overruled this demurrer on the ground that I preferred to understand the entire facts in the case before passing definitely upon the question raised by it, allowing the defendants to reserve their demurrer by their answer. The defendants again insisted at the hearing upon this question, and it has been again considered. It appears, from the proof, that the Otis Bros. Manufacturing Company were the owners of the patents in question; that on the eighth day of March, 1877, said company assigned to the Smith & Beggs Co. Machine-works of St. Louis all their interest in these patents in certain states, including the state of Illinois, conditioned upon the performance by the Smith, Beggs & Co. Machine-works of the terms and conditions of an agreement made by the Otis Bros. Company with Anthony W. Smith and others in reference to said patents on the same day; and in case the Smith, Beggs & Co. Machine-works did not so perform all the conditions of their contract, the title conveyed by said assignment was to revert to the Otis Bros. Company. It thus appears that the title of the Otis Bros. Company was never fully divested, or, at least, that they had a possible reversionary right in the patent. They were also the owners of the patent in other portions of the United States, and, being such owners, were conditionally interested, at least, in the patents within the territory of Illinois, and generally interested in having their patents upheld. It seems to me they had a right to join with the Smith, Beggs & Co. Machine-works in this suit, because they were interested in the proper prosecution and protection of the patent, as well as possibly interested in whatever might be recovered in this case. I think, therefore, the objections for misjoinders are not well taken. The finding of the court, therefore, is that defendants do not infringe either of the patents mentioned in the bill, and that the bill should be dismissed for want of equity.

ALABASTINE Co. v. PAYNE.¹

(Circuit Court, N. D. New York. May 10, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 161,591, granted to Melvin B. Church, April 6, 1875, for an improvement in calcimine, consisting of pulverized calcined gypsum and white glue, the latter being dissolved in hot water, and, when cold, stirred into the gypsum with sufficient cold water to bring the mixture to proper consistency to be applied with a brush, is infringed by one who sells a dry mixture of pulverized calcined gypsum and glue, put up in packages, with printed directions for reducing such mixture to a liquid according to the formula of said patent.

2. SAME—ACCESSORY TO INFRINGEMENT.

In selling a compound which the seller knows cannot be practically applied without making the user a trespasser, such seller renders himself an accessory to the infringement.

Motion to Dissolve Injunction.

George H. Lothrop, for the motion.

John R. Bennett, opposed.

COXE, J. The complainant is the owner of letters patent No. 161,591, granted to Melvin B. Church, April 6, 1875, for an improvement in calcimine. The inventor, in the specification, says:

"I take of pulverized calcined gypsum nine pounds, and of white glue one pound, the glue having been previously dissolved in hot water. When this glue, thus dissolved, is cold, I stir it into the gypsum in any suitable vessel, adding thereto, from time to time, sufficient cold water, until the mixture has the consistency of mixed paint for priming coats, when it may be laid on the wall with a brush, where it sets slowly; affording a hard, dead-smooth surface, that will not rub off, and is much cheaper than the calcimine which has whitening or zinc for the body."

The claim is for "a calcimining compound, adapted to be used with brushes, composed of pulverized calcined gypsum, dissolved glue, and cold water, substantially as described."

It is conceded by the defendant that this patent is valid; or, to be more accurate, that he is not in a position to deny its validity. The question of infringement, therefore, is alone involved.

The defendant has sold to consumers in this district a compound known as "Anti-kalsomine," composed of pulverized calcined gypsum and white glue, manufactured and sold to him by a company located at Grand Rapids, Michigan, of which Melvin B. Church, the patentee, is president, general manager, and prime mover. Church was for years, as superintendent of the complainant corporation, engaged in manufacturing and selling a compound known as "Alabastine," which he then insisted and publicly proclaimed was protected by the patent in controversy. Having disposed of his patent to the complainant, and severed all connection with his former associates,

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

Church is now, through the medium of the new corporation, engaged, to the great injury of the complainant's business, in selling Anti-kalsomine, a compound almost exactly identical with Alabastine.

The question to be determined is whether, keeping in view the past relations of these parties, the plea of non-infringement should now be accepted by the court. It is contended that one who sells a dry mixture of pulverized calcined gypsum and glue, even though he subsequently reduces it to a liquid condition by the addition of hot water first and cold water afterwards, does not practice the invention.

The defendant sells the gypsum and glue put up in packages, upon which are printed directions, to which it is unnecessary to refer in detail further than to say that, *mutatis mutandis*, they follow quite closely the formula of the patent. The liquid thus produced, ready for use upon the wall, is almost the exact counterpart of that described and claimed in the patent. With this product alone before him it would be a difficult task, even for an expert, to say how it was produced,—whether the former or the latter directions were followed. In selling a compound which he knows cannot be practically applied without making the user a trespasser, the defendant, within the doctrine of the following authorities, renders himself an accessory to the infringement: *Rumford Chemical Works v. Hecker*, 2 Ban. & A. 351, 363; *Cotton-tie Co. v. Simmons*, 106 U. S. 89, 94, 95; S. C. 1 Sup. Ct. Rep. 52; *Tilghman v. Proctor*, 102 U. S. 707, 728; *Goodyear v. Railroad Co.*, 2 Wall. Jr. 356, 359; *Wallace v. Holmes*, 9 Blatchf. 65; *Woodward v. Morrison*, 1 Holmes, 125; *Bowker v. Dows*, 3 Ban. & A. 518; *Travers v. Beyer*, 26 Fed. Rep. 450.

Parties should not be permitted to evade the law by such proceedings as these papers disclose; it is the clear duty of the court to arrest the wrong in its inception.

The motion to dissolve the injunction is denied.

HILL v. BIDDLE and others.¹

SAME v. SMITH.

(Circuit Court, E. D. Pennsylvania. April 30, 1886.)

1. PATENTS FOR INVENTIONS—NOVELTY—IMPROVED HOG-RINGS.

Letters patent 130,853 were granted to complainant for a triangular hog-ring, so constructed as to conform to the shape of the hog's snout, and remain stationary therein. *Held*, that the invention possessed novelty, value, and utility, and that the patent was therefore valid.

2. SAME—UTILITY.

The utility of a machine, instrument, or contrivance, as shown by the general public demand for it, while not conclusive, is highly persuasive evidence of novelty and invention, and, in the absence of pretty conclusive evidence to the contrary, will generally exercise a controlling influence.

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

In Equity.*Morgan & Lewis*, for complainant.*D. Connolly*, for defendants.

BUTLER, J. The suit is for infringing the second claim of plaintiff's patent, No. 130,853, which reads as follows: "The triangular shaped ring, D, with the catch, *d*, or with points, 'H, or levels, substantially as shown and described, and for the purpose set forth." The alleged infringement is fully proved. There is no difference between the ring manufactured and sold by the defendant and that described by the patent.

The defense set up is twofold: *First*, that the patent is invalid, for the reasons that the ring was anticipated, that it involved no discovery or invention, and that it is not useful; *second*, that the first claim of the patent is void, and the plaintiff has known it for years, and has, nevertheless, omitted to file a disclaimer as provided for by section 4922 of the Revised Statutes, and therefore cannot recover in equity.

These defenses were urged with much earnestness and ability. We are not convinced, however, of the soundness of either of them. The plaintiff's conception was that a ring so constructed as to fit or conform to the hog's snout, or rooter, would be more comfortable to the hog, and more serviceable in restraining his disposition to root, than the ordinary rings employed at the time. The invention consisted in the construction of a ring embodying this conception,—a triangular ring that fits the shape of the snout, and keeps its place. While it may be said that this required but little change in the old ring, and was easily accomplished, yet nobody had before accomplished it, or conceived the idea and advantage, of making a ring of this form for such a purpose. That this conception, and the embodiment of it, was of great value cannot be doubted. The public at once recognized its advantages, and demanded it of the trade to such extent as shows a preference for it over all other rings in use. According to the evidence, about one-third of the rings sold by the trade are those of the plaintiff. The defendant, in effect, acknowledges that he manufactures this form of ring because of the great public demand for it. While it is true that the utility of a machine, instrument, or contrivance, as shown by the general public demand for it when made known, is not conclusive evidence of novelty and invention, it is nevertheless highly persuasive in that direction, and, in the absence of pretty conclusive evidence to the contrary, will generally exercise controlling influence. *Smith v. Goodyear*, 93 U. S. 486; *Manufacturing Co. v. Haish*, 4 Fed. Rep. 907; *Eppinger v. Richey*, 14 Blatchf. 307.

I do not find such contrary evidence in this case. While there is here, as in most cases, room for debate, a careful examination has satisfied me fully that the court would not be justified by anything

shown, in decreeing the claim invalid on either of the grounds suggested. Nor am I satisfied that the court would be justified in concluding that the plaintiff knew or believed the first claim of his patent to be invalid, and that he has therefore been guilty of bad faith in omitting to disclaim, as urged by defendant. That the validity of this claim has been called into question and doubted is shown; but that it has ever been adjudged invalid by a competent tribunal, or that plaintiff has ever acknowledged or believed it to be so, is not shown. As the burden of proof respecting this, as well as the other branch of the defense before considered, was on the defendant, it follows that my judgment is against him.

A decree will be entered accordingly.

THE STRATHAY.¹

THE YOUNG AMERICA.

PUTNAM and another v. THE YOUNG AMERICA.

(District Court, S. D. New York. May 1, 1886.)

1. TOWAGE—GROUNDING—PILOT IN CHARGE OF NAVIGATION—ASSUMPTION OF AUTHORITY BY TUG—SUBSEQUENT ACCIDENT—LIABILITY.

The tug A. was towing the bark S. upon a hawser eastward through Hell Gate on the flood-tide. The bark had a Hell Gate pilot on board, who was in control of the navigation. It was the tug's duty to govern herself by the bark, and to keep ahead of her as nearly as possible. The tug was following another tow from 500 to 600 yards distant, consisting of a ship towed between two tugs. Both tows were intending to go through the channel east of Flood rock. As the tow ahead neared Flood rock it sheered to the starboard somewhat across the east channel. The captain of the tug A. observing this, and thinking it would be unsafe to follow through the east channel, when about 500 yards from Flood rock, and in mid-river, starboarded his helm to go through the north channel, without consulting the pilot. The pilot on the bark at once objected to this change; but the other persisting, he quickly acquiesced, and starboarded the helm of the bark. In swinging, the keel of the bark struck the rocks of the middle reef, and injured the schooner, so that she afterwards sank. *Held*, that the captain of the bark was in fault in taking into his hands the control of the navigation of the tug, by changing his course without notice to the pilot, and in insisting upon that change without the pilot's consent. The change of course was therefore at his risk, and the grounding was the fault of the tug.

2. SAME—SITUATION IN EXTREMIS—ERROR OF JUDGMENT BY PILOT.

Had the pilot on the bark immediately acquiesced in the tug's maneuver, the schooner would probably have escaped; but that was found on the facts to have been more dangerous than to have kept on. *Held*, no defense to the tug, as the latter, in adopting, without authority, a dangerous maneuver, thereby put the pilot in a situation *in extremis*, in which even an error of judgment, on his part, had there been any such error, was not a legal fault.

Jas. K. Hill, Wing & Shoudy, (H. Putnam,) for libelants.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. During the afternoon of the twenty-ninth of January, 1886, as the bark Strathay was being towed by the steam-tug Young America up the East river, upon a hawser about 50 fathoms in length, going eastward through Hell Gate, her keel struck upon the rocks of the middle reef, and was broken, causing such a leak that she afterwards sank. The day was pleasant; the tide about half flood. The tug and tow went up the west side of Blackwell's island, following the ship Alfred Watts at a distance of about one-third of a mile, which was likewise bound through Hell Gate, and was in tow of two tugs lashed along-side of her. The tide ran from three to four knots. The progress of the Watts through the water was slow; and the Young America, though she checked her speed occasionally, and was going only at the rate of about one and one-half knots through the water, gained somewhat upon the ship. Both were intending to go through the easterly channel, between Flood rock and the Astoria shore, which is about 700 feet wide. When the ship had reached a point in the usual course about 300 feet to the southward and eastward of Flood rock she took a sheer to starboard. The Young America at this time was from 500 to 600 yards astern of the ship. The captain of the Young America, observing the sheer, and deeming it imprudent to follow on after the ship through the east channel, starboarded his wheel for the purpose of turning to the left, and thence around through the north channel. Before starboarding his wheel the course of both the tug and the bark had been already directed towards the easterly channel, and they were fully half the distance across from the New York shore to the end of Blackwell's island. The bark had on board, besides her officers and crew, a special Hell Gate pilot, and also a Sound pilot. The established custom and duty, as between the tug and tow, in such cases are for the Hell Gate pilot to control and direct the navigation through Hell Gate; and for the tug to keep ahead of the tow as nearly as possible, and to govern her course and action by the course of her tow. The Hell Gate pilot on board the bark had shaped his course for the east channel, and the tug had done the same. The pilot had not starboarded, nor given to the tug any order to starboard. On seeing the tug going to port under a starboard helm, however, he understood the tug's intention to attempt to go by the north channel; and he immediately rushed upon the house, and hailed the tug, saying: "You can't do it!" to which the reply came immediately: "I can do it; starboard your helm." This was answered by a renewed protest that the tug could not do it, and the previous reply was repeated. The tug meanwhile kept on turning down the stream to pull the bark around, down stream, and away from the rocks towards which the tide was sweeping her. After the second reply from the captain of the tug the pilot of the bark immediately put his helm hard a-starboard; but in swinging around the

keel struck the rocks, and was broken, as above stated. After swinging further to the westward she drifted up with the tide, stern first, through the north channel.

I have no doubt, from the evidence, that there was a strong sheer of five or six points on the part of the ship. It was broken by the action of the tugs on each side of her, which put their engines in contrary motion, so as to turn the ship about. Her headway through the water was thereby checked until, according to the evidence, she merely drifted with the tide. When the first sheer to starboard was broken, she took something of a sheer to port, and in that manner, with little if any headway, drifted through the easterly channel to the upper end of Flood rock, where she got straightened, and resumed her progress.

The width of water in the east channel available for vessels of a draught of 22 or 23 feet, like the bark in question, is not over 600 feet; and there is no doubt that it would not only have been contrary to the special rule of the inspectors, (rule 7,) but dangerous, to attempt to pass by the ship in the east channel when the latter was under such a sheer as that described.

There is a great deal of very loose and inaccurate testimony in the case on the part of the claimants, in regard to the intervals of time and distance, the navigation of the ship under her sheer, and the risks likely to be encountered by the bark, involving great exaggerations and inconsistencies, for the evident purpose of exonerating the captain of the Young America from blame. All agree, however, that when the ship took her sheer the bark was a considerable distance astern,—most of the witnesses say from 500 to 800 yards; and, as the bark was at that time about abreast of the upper end of Blackwell's island, it is pretty certain that the distance was not less than 600 yards. This distance was so great, and the speed of the tug and bark through the water was so small, that there was, in my judgment, no actual danger whatever in the tug's keeping on and following the ship at the tug's slow rate of speed. No one estimates the speed of the tug through the water at above one and one-half knots. Her captain testified that it was only one-half a knot. The tide, as it has been often proved before me, flows true, on the flood, through the easterly channel, from the point at which the ship had arrived when she took her sheer. According to the testimony in this case, it was then running from three to four knots. In other cases before me the testimony has shown a much greater speed. But, assuming every doubtful point in favor of the tug; that the tide ran only at the lowest rate here testified to, namely, three knots; that the speed of the ship through the water was entirely checked, which could not have been the fact, except for a very small portion of the time; and assuming that the tug was going at the highest rate estimated, namely, one and one-half knots through the water,—under all these conditions, the tug would have run by land only 450 feet while the

ship was going 300 feet; so that the ship, which was 1,500 feet, or 500 yards, ahead when she commenced her sheer, would have been carried by the tide alone 1,000 yards before the bark could have reached her, even without the tug's slackening speed. The tide alone, therefore, would have carried the ship beyond Hallett's point, a distance more than three times the space in which there was any danger from Flood rock, before the tug would have reached her. This rock does not extend more than 1,000 feet from the point where the sheer began, and must have been passed within three minutes, and before the tug could have overtaken the ship.

These facts are indisputable. They were easy to be perceived and estimated upon the spot. It was evident at the time that, notwithstanding the sheer, the ship must pass through the dangerous part of the passage long before the bark could reach her. In the situation in which the Hell Gate pilot on the bark found himself when the sheer was observed, his course being already shaped for the easterly channel, the circumstances did not require him to resort to the dangerous maneuver of changing his course to attempt the north channel, in the face of the rocks ahead. From the result, it may be admitted that if the bark had starboarded instantly, as soon as the tug starboarded, she would probably have just barely escaped injury. But the attempt to change her course was highly dangerous,—far more so than keeping on. The pilot of the ferry-boat near by, familiar with the waters, expected the accident when he saw the attempt, and he hailed the tug in order to prevent it. As the event turned out, I have no doubt that had the view of the Sound pilot to keep ahead, or the view of the captain of the tug when he starboarded, been followed, without embarrassment from the other, no accident would have happened. The accident arose from divided counsels, and from the tug's assuming the control of the navigation without leave. Even if there were no rule determining who should control in such cases, there can be no doubt, upon the facts above recited, that the Hell Gate pilot had the better judgment, and was incurring less danger in following the ship than in attempting a change of course. But the rule is well established that the navigation is under his control, and not under the control of the tug, and that the latter is bound to follow, and not to lead. The circumstances were all as plainly in view of the pilot of the bark as of the captain of the tug. The tug-boat herself was in no danger; she was capable of taking care of herself in any situation. The Hell Gate pilot was responsible for the bark. It was a clear breach of duty on the part of the captain of the tug, and without any legal excuse or justification, that he took into his own hands the control of the navigation of the bark, by changing the course of the tug and bark without any previous notice to the Hell Gate pilot, and to insist upon that change, as he did, without the other's consent. It was therefore legally at his risk and peril, and the grounding must therefore be held the fault of the tug.

It constitutes no defense that if the pilot had immediately acquiesced in the tug's maneuver she would have escaped. The pilot on board the bark was bound to exercise his own best judgment. He was on board the bark for that purpose, and for nothing else. That was his legal obligation to the bark; and it would have been at his own risk had he surrendered that judgment to the captain of the tug without necessity. The maneuver attempted by the tug was, as I have said, clearly a dangerous one,—apparently far more dangerous than to keep on. When the pilot shouted, "You can't do it," had the tug returned to the course of the bark, as it was her duty to do, no accident would have happened. There was no obstinate persistence, however, on the pilot's part. He acted rapidly. The hails were in quick succession. The time of the delay must have been less than half a minute; and when he saw that the tug kept on and insisted upon her maneuver, he immediately put his helm hard a-starboard. In this the pilot certainly did not exceed the limits of a reasonable assertion of his own superior authority and judgment, and he yielded as soon as it was perceived that the tug insisted upon her course. The captain of the tug, in wrongfully assuming the control of the navigation, took upon himself the risk of divided opinions, and of a reasonable time necessary to procure the pilot's concurrence. In adopting, without authority, a dangerous maneuver, the tug put the pilot in a situation *in extremis*; and even if the pilot made an error of judgment in not acquiescing instantly, and without protest, that was not a legal fault. The fault in such cases is legally his alone who wrongfully brings the other into that situation. *The Elizabeth Jones*, 112 U. S. 514, 526; S. C. 5 Sup. Ct. Rep. 468; *The Bywell Castle*, 4 Prob. Div. 219. But, as above observed, there was not, in my opinion, any error of judgment even on the part of the pilot in his protest. To keep on was apparently the safer course; but he speedily acquiesced when he found he could not help himself, and from that moment he did everything that he could to aid the tug. The bark is, in my judgment, without legal fault, and the libellant is entitled to a decree, with costs.

In this decision I exclude all reference to the damages to the cargo, since that is no longer represented in the case; and the subsequent conduct of the bark leaves it an open question whether she is not at least jointly responsible for the damages.

THE SAN MARCOS.¹

McARTHUR v. THE SAN MARCOS.

(District Court, S. D. New York. May 15, 1886.)

1. SEAMEN—WAGES—FORFEITURE OF WAGES—SHIPPING ARTICLES—STATUTORY PROVISIONS.

In so far as shipping articles provide for a forfeiture of wages in excess of that provided by statute, they are contrary to law.

2. SAME—ENTIRE FORFEITURE—DESERTION—ABSENCE NOT AMOUNTING TO DESERTION.

In coastwise vessels, as well as in foreign trade, an entire forfeiture of wages, upon the analogy of the statute, should be limited to cases of desertion. In a case not amounting to desertion, and not of any aggravated misconduct, the forfeiture should not exceed more than two days' pay and the expense of a substitute, etc.

3. SAME—SECTION 4596, REV. ST.—STATEMENT OF CASE.

Libelant, an engineer on the Mallory Line, was absent without leave when his vessel sailed, but, as the evidence indicated, had no intention of deserting. Under the provisions of the shipping articles, all wages were declared forfeited for absence without leave. Section 4596, Rev. St., provides that "any seaman, for neglecting, without reasonable cause, to join his vessel, or to proceed to sea with his vessel, or for absence without leave, at any time within 24 hours of the vessel sailing, * * * shall be punishable by imprisonment, and also, at the discretion of the court, by forfeiture of not more than two days' pay," etc. *Held* that, whether these provisions are now strictly applicable to coastwise voyages or not, since the maritime law does not enforce against seamen unreasonable or oppressive stipulations, the analogy of the statute should be followed, and but two days' wages should be deducted, the ship having been put to no expense by the libelant's absence.

Hyland & Zabriskie, for libelant.

Butler, Stillman & Hubbard, (*George Gordell*), for claimants.

BROWN, J. The libelant sued for 11 days' pay as second engineer on board the steam-ship *San Marcos*, of the Mallory Line, running between New York and Galveston. He signed shipping articles for the voyage on the twenty-ninth of August last, in New York; did duty on the steamer upon her outward trip, and was left behind at Galveston on account of his absence without leave at the time of sailing. He was entered in the log as a deserter, and payment of wages during the time he had served having been refused, this libel was filed to recover them.

The articles contained a stipulation that if any seaman should "absent himself at any time without liberty, the wages due at the time of his disobedience or absence should be forfeited." In the case of *Webb v. Duckingfield*, 13 Johns. 389, a similar provision in the articles was sustained, and held to preclude recovery. But that case, as held by the court, was one of desertion, the seaman having left contrary to orders, and refused to help unlade the ship, before the termination of the voyage. Upon the facts in this case I cannot find that

¹Reported by Edward G. Benedict, Esq., of the New York bar.

the libelant was a deserter. The vessel sailed a little before 12. Between 10 o'clock and the time of sailing the libelant went ashore twice, to post two letters and get stamps. On his way to the ship the last time he met an acquaintance, who took him to another vessel some 600 yards distant, and not long afterwards the San Marcos was seen leaving her dock. The libelant testified that he was informed by the first assistant engineer that the ship was not to sail until half-past 1. He left his clothes on board, and, I am satisfied, had no intention of deserting the vessel. He was somewhat addicted to the use of liquor, but testified that he was sober that day. The evidence of the claimant is to the effect that the chief engineer had given notice to his department that the vessel would sail about noon, and that preparations for departure were making when the libelant went away the last time, some of the lines being already cast off. But the first officer, who saw him going, gave him no notice of the speedy departure. I have no doubt that the libelant's absence was negligent and inexcusable; but he had no intention of not returning before the ship sailed. He was absent without leave, however, and in fault; and the claimants contend that the provision of the articles forfeiting his wages for that cause is a valid legal defense to this action.

The absence without leave in the case of *Webb v. Duckingfield*, being a case of desertion, the decision was in fact only an application of the ordinary rule of the maritime law, and in harmony with the sixth section of the act of 1790, and was so viewed by the court. Since that time the whole subject of desertion, and of the penalties therefor, has been regulated by the act of June, 1872, now section 4596 of the Revised Statutes, though, by a subsequent general exception, coastwise voyages may be now excepted. Subdivision 2 of that section provides that "any seaman, for neglecting without reasonable cause to join his vessel, or to proceed to sea with his vessel, or for absence without leave at any time within 24 hours of the vessel sailing from any port, either at the commencement or during the progress of any voyage, shall be punishable by imprisonment of not more than one month; and also, at the discretion of the court, by forfeiture of his wages of not more than two days' pay; and for every 24 hours' absence, either a sum not exceeding 6 days' pay, or any expenses which have been properly incurred in hiring a substitute." The seventh subdivision of section 4511 allows shipping articles to contain regulations as to deducting fines, "or other lawful punishments for misconduct, which may be sanctioned by congress as proper." The eighth allows "other matters not contrary to law."

It has long been the settled practice in admiralty to regard with disfavor all provisions of the shipping articles that are either unusual or tend to operate oppressively upon seamen. In the case of *Harden v. Gordon*, 2 Mason, 541, 556, STORY, J., says:

"Every deviation from the terms of the common shipping paper (which stands upon the general doctrines of maritime law) is rigidly inspected; and

if additional burdens or sacrifices are imposed upon the seamen without adequate remuneration, the court feels itself authorized to interfere, and moderate or annul the stipulation." Macl. Shipp. 223; Abb. Shipp. *610, note; 2 Pars. Shipp. 99; 3 Kent, Comm. *193; *The Mentor*, 4 Mason, 84, 100; *The Minerva*, 1 Hagg. 347; *Brown v. Lull*, 2 Sum. 443, 449; *Brink v. Lyons*, 18 Fed. Rep. 605.

One of the objects of the various acts of congress in reference to seamen is to protect them against their own imprudence, as well as against being overreached by their employers. By providing for the punishments and forfeitures specified, these acts, by implication, forbid the exaction of greater punishments or forfeitures for the same causes. If further penalties and forfeitures could be legally enforced by the mere change of the form of the shipping articles, the protection designed by congress would be evaded. In so far as the articles provide for a forfeiture of wages in excess of that provided by law for the same offense, it is contrary to law, and not in conformity with section 4511. An entire forfeiture of wages must be limited to cases of desertion. Whether these provisions of law are now applicable to coastwise voyages or not, the principles involved in them should govern the courts in dealings with seamen. They but reflect the spirit of the maritime law as laid down in the authorities above cited. Following the general rule of the maritime law, which abhors the entire forfeitures that would often leave seamen helpless and dependent, (*The Mentor*, 4 Mason, 100,) and which refuses to enforce such forfeitures except for gross misconduct, a forfeiture of entire wages, such as is here claimed, under these articles, should be limited to cases of that character. In a case not amounting to desertion, and not of any aggravated misconduct, the forfeiture, upon the analogy of the statute, should not exceed more than two days' pay, etc., and the "expense of hiring a substitute." In this case no substitute was hired; the ship incurred no loss; and there was no voluntary absence on the part of the libellant for any period after the day when the ship sailed. I deduct, therefore, two days' pay, and allow a decree for nine days' wages, with the disbursements of suit.

THE W. A. MORRELL.¹

NATIONAL STEAM-SHIP CO. v. THE W. A. MORRELL and another.

(District Court, S. D. New York. May 17, 1886.)

1. CARRIER—OF GOODS BY VESSEL—DELIVERY OF CARGO—DISPUTE AS TO QUANTITY—CARRIER'S RIGHT TO IMMEDIATE SETTLEMENT OF CONTROVERSY.

A carrier is entitled to have settled upon the spot, in some form, any dispute concerning the number of articles delivered by him. He cannot be required to adjourn the controversy to a distant place, or a future time, for determination and settlement in a remote forum. The delivery is conditional only until such a receipt is either given or waived.

2. SAME—CARRIER'S RIGHT TO HAVE RECEIPT—ATTACHMENT OF CARGO FOR RECEIPT—TALLIES DISCORDANT—SUBSEQUENT DELIVERY TO OWNERS—COSTS.

Where a dispute arose, upon discordant tallies, between the National Steamship Company and the schooner M., concerning the number of certain packages delivered by the former to the latter; and the schooner sailed away with the articles on board without any retally, or adjusting the controversy, or giving a clean receipt for the number she had actually received; whereupon the steamship company attached the whole of the articles, and also the schooner: *held*, that the steamship company was entitled to a receipt; and that the schooner, in departing without settling the controversy, and without giving or tendering a clean receipt, acted at her peril; and that the libel was therefore legally filed to arrest the whole quantity. *Held, further*, that as, after the bonding of vessel and cargo, the cargo had been delivered to the owners, and the latter had been compensated by the schooner for all shortage, no further question remained to be adjusted but that of costs and expenses, and these the libellant is entitled to recover, as the schooner was in fault, and the evidence does not establish any fault in the libellant.

B. ADMIRALTY—JURISDICTION—IMPLIED CONTRACT TO GIVE RECEIPT—MARITIME OBLIGATION.

The claim of the libellant in this case rested wholly upon the obligation of the implied contract of the schooner to give a clean receipt for the packages taken aboard, and to have any doubt about the number settled before sailing. *Held*, that the obligation of the schooner to so receipt for the cargo was a maritime obligation within the jurisdiction of the admiralty.

John Chetwood, for libellant.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. In March, 1886, the steamship Queen, of the libellant's line, arrived in this port with 7,775 packages of iron wire, belonging to the American Screw Company of Providence. The company were in the habit of receiving similar consignments, and had arranged with the owners of the Morrell, and of other vessels, to take their goods from the dock when landed, to be transported to Providence. The wire in question was all landed upon the dock, was weighed by the custom-house weigher, and placed in six piles, on different parts of the dock. The Morrell took it all on board, and kept tally of the bundles taken. An employe of the libellants also kept tally; and the custom-house weigher kept tally of the weight, and, to a certain extent, of the bundles. The tally of the libellants' man exceeded by one the number stated in the bill of lading, making 7,776; the Morrell's tally made 108 bundles less. The captain of the Morrell refused to give a clean receipt for the full number of the steamer's

¹Reported by Edward G. Benedict, Esq., of the New York bar.

tally, except with the condition in the receipt, "108 in dispute." This qualification was refused, and the Morrell thereupon sailed away for Providence, whereupon this libel was filed to recover back the iron wire; and the Morrell and the wire were seized by the marshal before they had passed out of this jurisdiction. The freight on the whole number had been paid in full. After seizure by the marshal the ship and cargo were released upon a stipulation for the value of the 108 bundles of wire in dispute. Thereafter the schooner went to Providence, and, upon the delivery there, the tally showed 34 less than 7,776. The weigher's tally in New York was equal to the estimated weight in the bill of lading; and the tally of weight in Providence exceeded the weight stated in the bill of lading for the whole number.

1. The claimants object to the jurisdiction of this court on the ground that the nature of the libelants' demand is not maritime. But the libelants' claim, if valid, rests wholly upon the obligation of the implied contract of the schooner to give a clean receipt for the wire actually taken aboard, and to have any controversy as to the number adjusted before sailing for a distant port. The carrier had a special property in the wire, and was bound to deliver all that the bill of lading called for; and the schooner having taken the wire aboard, the obligation to receipt for it in discharge of the libelants was a maritime obligation. I must therefore sustain the jurisdiction.

2. The evidence shows a well-settled custom and usage that entitles the carrier to a receipt for the articles delivered. This is laid down as the general law of carriers. Hutch. Carr. § 423. Small differences are usually passed over by a memorandum in the receipt of the number in dispute or injured. But the evidence shows that this is not applicable to large variations. Sometimes, when articles have been loaded, and the first carrier can conveniently send a man to make a tally upon discharge by the second carrier, that course is adopted. The master of the schooner desired that course to be pursued in this case after the seizure under process, and he offered to take one of the libelants' men to Providence for the purpose. The libelants, on the other hand, offered, before she sailed, to unload the schooner upon the stipulation that the one found to be wrong upon another tally should pay the expense of unloading and reloading. This the master refused, and started upon his voyage without any settlement of the controversy, and without previous notice to the libelants, or the delivery of any receipt.

The carrier is entitled to have settled upon the spot, in some form, any dispute concerning the number of articles delivered by him. The custom that gives him a right to a receipt, recognizes his right to the protection which that voucher gives him for having performed his contract; and when a dispute arises as to the number delivered, the carrier is legally entitled to have it settled then and there. He cannot be required to adjourn the controversy to a distant place, or a

future time, for determination and settlement in a remote forum, for the convenience of another carrying vessel. Any such practice would be attended by great embarrassments, and interfere materially with the performance of the original carrier's duties. All deliveries by the carrier must therefore be held to be incomplete and conditional, and subject to the implied obligation of the person or vessel that receives the goods to give a proper and clean receipt for all the articles actually delivered, without qualification, unless such a clean receipt be waived. It is the duty of both, in case of dispute or differences in the tallies taken, to take promptly all necessary means to settle the controversy; and the expense necessarily attending the correction of any such errors must fall upon the one that caused the error. Where both are involved in blame, the expense must be charged upon both.

There can be no doubt, upon the proofs, that the tally of the schooner was kept incorrectly. As the tally at Providence was within 34 of the libelants' tally, the number put on board could not have been 108 short. In sailing away without adjusting this controversy, and without giving or tendering any clean receipt for the whole number she had actually received, she was in the wrong, and acted at her peril. The libel was therefore legally filed to arrest the whole quantity, as the libelants could not be deprived of their right of possession of the wire without a proper clean receipt for what they had delivered; and in that view the libel must be sustained.

The whole cargo delivered on board the Morrell has, however, been delivered to the true owners. A careful examination of the custom-house weigher's testimony, and of his tally of weight and numbers, satisfies me that they are in accord with, and confirm the correctness of, the tally kept by libelant's tally-man, and that 7,775 coils were put aboard the schooner. The custom-house weigher relied more on the weight of each 20, than on the actual count. His tally of weights shows a remarkable uniformity; the greatest weight of any 20 coils being 1,164 pounds, and the least weight 1,124 pounds,—a difference of only 40 pounds, which is less than the weight of a coil,—the average of the whole being $57\frac{1}{4}$ pounds per coil. Most of the sets of 20 weigh from 1,136 to 1,156 pounds. This shows that it is very improbable that there was any error in the number as tallied by the libelant in New York; and the delivery of a somewhat greater weight by tally at Providence leads to the conclusion that the entire number was actually delivered there. I am satisfied that the whole number has reached the hands of the true owners, and that the latter have no longer any claim against the libelants; and the libelants, having also been paid their freight, have no further interest in the wire. There should be no decree, therefore, for the wire or its value; but the libelant is entitled to the costs and disbursements of the proceedings, since the schooner was in fault, and the evidence, as finally submitted, does not establish any fault in the libelant, or in its proceedings.

THE PERKIOMEN.¹

THE ABBIE C. STUBBS.

(District Court, D. Massachusetts. May 8, 1886.)

COLLISION—STEAMER AND SAILING VESSEL—FOGGY WEATHER—REVISED INTERNATIONAL REGULATIONS—SAILING RULES, ART. 12, CONSIDERED AND CONSTRUED.

The schooner A., while running close to the edge of a fog-bank, came into collision with the steamer P. In the immediate vicinity of the schooner, and inshore from her, the atmosphere was clear; but offshore, and over the track of the steamer, there hung a low mist or fog, the effect of which was to shut out entirely from each vessel the side lights of the other until too late to prevent a collision. The mast-head light of the steamer was visible from the schooner's deck for at least 20 minutes prior to the collision. Neither vessel gave the fog-signal prescribed by the sailing rules. *Held*, that a vessel is under obligation to observe the rule, not only when she is actually enveloped in a fog, but also when she is so near it that it is necessary that her position should be known to any vessel that may happen to be within it. As neither vessel complied with this rule, they must both be held liable for the consequences of the collision.

Cross-libels for a Collision between the steam-ship *Perkiomen* and the schooner *Abbie C. Stubbs*.

R. Stone, for the *Perkiomen*.

W. W. Dodge, for the *Abbie C. Stubbs*.

NELSON, J. There is very little disagreement between the parties as to the material and controlling facts in this case. They are, briefly, these: The collision happened about midnight between the fifteenth and sixteenth of July, 1885, near the whistling-buoy, five miles off Monomoy beach. The *Perkiomen*, a large steam-collier belonging to the Reading Railroad, was on a voyage from Port Richmond to Boston, with a full cargo of 1232 tons of coal. She had passed through Pollock Rip slue, and had just got by the whistling-buoy on her starboard side, and was heading N. by E., with a speed of 7 knots an hour. The schooner *Abbie C. Stubbs*, of 328 tons, was on a voyage from Boston to New Bedford, with a part cargo of pyrites. She was close-hauled on the starboard tack, steering S., with the wind S. W. by W., and light, and her speed was four knots. In the immediate vicinity of the schooner, and inshore from her, the atmosphere was clear, and Chatham, Monomoy, and Shoveluf lights could be seen distinctly; but offshore to the southward, extending over the shoals and the track of the steamer, there hung a low fog or mist, which shut out from the schooner Pollock Rip light and the side lights of the steamer, and also shut out from the steamer the side lights of the schooner. But the fog did not rise so high above the water as to shut out from the schooner the steamer's mast-head light. That was clearly visible from the schooner's deck,

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

and was observed and watched by her master and mate, a point or two over the starboard bow, for 20 minutes before the collision. The course of the schooner was close to the edge of the fog-bank. As the steamer emerged from the fog, she then for the first time became aware of the vicinity of the schooner by seeing her green light over the port bow. Her wheel was then put hard a-port as soon as possible, and she swung off to starboard; but it was too late. The schooner, continuing her course, struck the steamer, head on, amidships, on the port side, cutting into her hull to such a length that she soon filled and sunk, her men escaping in the boats. The schooner also was so badly damaged about the stem that she was beached to save her from sinking. Neither vessel, at any time before the collision, gave the fog signal prescribed by the sailing regulations.

By article 12 of the Revised International Regulations, adopted by the act of March 3, 1885, (23 St. 438,) when under way in fog, mist, or falling snow, whether by day or night, a steamship is required to make, with her steam-whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast; and a sailing vessel to make with her fog-horn, at like intervals, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with wind abaft the beam three blasts in succession.

As neither vessel complied with this rule, they must both be held liable for the consequences of the collision. The liability of the steamer was admitted at the hearing. The schooner does not admit hers, but it seems to be equally clear.

A vessel is under obligation to observe the rule, not only when she is actually enveloped in fog, but also when she is so near it that it is necessary that her position should be known to any vessel that may happen to be within it. The master of the schooner was aware of the fog to the southward from the fact that Pollock Rip light was obscured. His excuse is that he mistook the steamer's mast-head light for the light of a vessel at anchor on the shoals. That certainly is not a good excuse. The bright mast-head light was a clear indication that a steamer was approaching with her side lights obscured by fog. It seems incredible that a vigilant and skillful officer could mistake the bright mast-head light of a steamer, nearing him at the rate of 11 knots an hour, for the stationary light of a vessel at anchor, several miles away. Capt. Lewis, her master, admits that he was just approaching the fog-bank when the light was reported, and thought the light might be the mast-head light of a steamer coming north, and that he kept off a point to give his vessel more freedom of action in case his suspicion should be confirmed. This admission is fatal to the schooner's case, as it places her in a situation in relation to the steamer where it was her clear duty to sound her fog-horn.

Both vessels being found to blame, a decree is to be entered for the libelants in each case, the damages to be divided. Ordered accordingly.

THE TONAWANDA.¹

JARVIS and others v. THE TONAWANDA.

(District Court, E. D. Pennsylvania. May 4, 1886.)

MARITIME LIEN—FOREIGN PORT—COOPERAGE—WHARFAGE—NEGLIGENCE.

The libelants furnished wharfage and cooperage materials for the ship *Tonawanda*, of Philadelphia, at Jersey City, at the request of A & Co., who had been the ship's agents in New York, and who were dealt with as such, when in fact, although unknown to the libelants, they were the owners of the ship. Payment was promptly sought of A & Co., and, upon their promise to pay, the *Tonawanda* was allowed to sail for Europe. She returned to Philadelphia twice, but of these visits libelants knew nothing. On her subsequent return to Philadelphia she was attached. This was two years after the expenses were incurred. In the mean time the ship had been bought by the respondents. Held that, as the expenses had been incurred in a foreign port, the unpaid charges became a lien to which the libelants were still entitled, as the facts do not show them to have been guilty of negligence.

In Admiralty.

Theodore M. Etting and *Thomas S. Williams*, for libelants.

Henry R. Edmunds, for respondent.

BUTLER, J. The libelants furnished the *Tonawanda* with wharfage, at Jersey City, in July and August, 1882, for which (and a small amount of material for cooperage) \$272.75 are claimed. The vessel was in charge of Zetlosen & Co., of New York, who were dealt with as agents. The bill, as rendered, was originally a trifle larger, and was reduced to the sum stated by agreement with Zetlosen & Co. The vessel sailed for Europe, leaving the bill unpaid; and in about six months thereafter came to Philadelphia, where the respondents bought her. She had formerly belonged to the Copes, of this city, but had been sold and transferred to Zetlosen & Co. before the charges for which she is sued were incurred. Of this sale and transfer, however, the libelants were ignorant; and Zetlosen & Co., who had formerly had her in charge as agents, were dealt with in this character. After remaining in Philadelphia for several weeks undergoing repairs, she made a second trip to Europe and back to Philadelphia. In November, 1883, she again sailed for Europe, and on her return to Philadelphia, in July, 1884, was attached for this claim. Payment had been sought of Zetlosen & Co. promptly, but the libelants were put off from time to time with promises which were never kept. After several months of delay thus obtained, inquiries were directed respecting the vessel's itinerancy, and she was eventually discovered to be at Trieste. On her next trip to this country she was attached, as stated.

When at Jersey City she was in a foreign port, and the unpaid charge there incurred consequently became a lien.

¹ Reported by C. B. Taylor, Esq., of the Philadelphia bar.

There is no question of law involved. It was the libelants' duty to exercise reasonable vigilance to enforce payment. Had the vessel returned to Jersey City, and they known it, or under such circumstances that they should have known it, and been permitted to depart without payment, the lien would have been lost. While she was abroad, of course, no amount of vigilance would have accomplished anything, except to ascertain her whereabouts. The libelants were not required to follow her then. The only time when she was within reach were the two occasions when she visited Philadelphia in 1883. The libelants were ignorant of these visits; otherwise they should have attached her there. The only question therefore is, should this ignorance be ascribed to carelessness,—want of proper vigilance? This is certainly a serious question,—one about which there is room for doubt. The libelants could have ascertained the fact, of course, either by keeping a constant watch upon the vessel's movements, or upon the entries at the port of Philadelphia. Did their duty, however, require this? Is such a course, under similar conditions, customary? I think not. When all the circumstances are considered, I think the libelants must be held to a higher degree of vigilance than is usually exercised or required, to visit them with the consequences of remissness, for failing to discover these visits. Certainly they were not bound to inquire into the proposed movements of the vessel when she left their dock, nor to hunt her up while treating with her supposed agents for payment. To do this would have been unusual, and to require it would be unreasonable. They expected payment from the agents, and, as is customary and proper, first exhausted their efforts in that direction. As soon as they ascertained, or could well ascertain, that the lien must be resorted to, they sought for and found the vessel. When she next visited the country they attached her. I think no more was required. Although a good deal of time elapsed between the creation of the lien and the attachment, I am not satisfied that the libelants are blamable respecting it. While the holders of such liens should be held to a proper degree of vigilance as against innocent purchasers, unreasonable activity and haste should not be required. It must not be overlooked that the purchaser always has it within his power to protect himself by his contract.

I do not esteem it necessary to consider the question whether the respondents were guilty of negligence in the purchase; nor the question of Zetlosen's solvency. If the libelants failed to exercise proper vigilance, their lien was lost thereby, irrespective of these questions; otherwise it continues to exist. In the light of adjudicated cases, I believe, as before stated, it must be held that they did not so fail. *The Prospect*, 3 Blatchf. 526; *The Walkyrien*, 11 Blatchf. 241; *The Europa*, Brown & L. 89; *The Atlantic*, Crabbe, 440.

A decree will be entered accordingly.

GLENN, Trustee, etc., v. WALKER.

SAME v. SCOTT.

(Circuit Court, W. D. Virginia. March 22, 1886.)

REMOVAL OF CAUSE—SUIT NOT ORIGINALLY WITHIN JURISDICTION OF CIRCUIT COURT—ACT OF 1875.

G., a citizen of Maryland, as trustee and assignee of a corporation chartered under the laws of Virginia, instituted suit against W. & S., citizens of Virginia, in a court of that state, and on motion of plaintiff the case was removed to the circuit court of the United States, whereupon defendants moved to remand. *Held*, that the suit was removable, and that the motion should be overruled.

Motion to Remand to the corporation court of the city of Lynchburg.

These suits were instituted in the corporation court for the city of Lynchburg against Walker & Scott, citizens of Lynchburg, Virginia, by Glenn, trustee, a citizen of Baltimore, Maryland, and assignee of the National Express & Transportation Company, a corporation chartered under the laws of the state of Virginia. On the motion of the non-resident plaintiff they were removed to the United States circuit court for the Western district of Virginia.

L. M. Kean, for Walker & Scott, argued that *Clafin v. Insurance Co.*, 110 U. S. 81, S. C. 3 Sup. Ct. Rep. 507, does not control these cases, because *Clafin v. Insurance Co.* might have been removed, as it was, under the law as it existed before third March, 1875; and that, therefore, the only legitimate effect of that decision was that a case removable on third March, 1875, was also removable after that act; that the construction given to the former acts had been given under the rule to "read the whole act to gether, and give effect to every part of it;" and that the application of the same rule to the act of third March, 1875, led to the construction that the limitation of section 1 applied to section 2; that to read sections 1 and 2 separately would be to nullify the plain language of the act, and that, in so far as *Clafin v. Insurance Co.* was inconsistent with this view, it was on questions not necessary to the decision of the case before the court, and *obiter dictum*; that the principle on which the cases had been decided before third March, 1875, was *not* to read sections *separately*, but to read the whole act together, and *give effect to every part of it*.

John Howard and Ed. S. Brown, *contra*.

PAUL, J. It is unnecessary for the court to discuss at length, or to review in detail, the various propositions presented by counsel, and so ably argued during the consideration of this motion. The important questions raised here have all been settled by precedents that leave this court without embarrassment as to the decision it must render. The discussion here, as in the cases quoted in argument,

turns chiefly upon the construction to be given to sections 1 and 2 of the act of congress of March 3, 1875, corresponding in the main to the provisions of sections 11 and 12 of the judiciary act of 1789.

It is contended by counsel for the defendants that sections 1 and 2 of the act of March 3, 1875, are to be regarded *in pari materia*, and are to be construed together; and that when thus construed they deny to this court jurisdiction of a cause which could not originally have been brought in this court, but which has been brought in a state court, and removed into this court under section 2 of said act; while counsel for the plaintiffs argue that sections 1 and 2 of said act must be construed separately, and that, when thus construed, these cases do not fall within that provision of section 1, act 1875, which says:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes negotiable by the law-merchant, and bills of exchange."

The decisions under the judiciary act of 1789, in *Bushnell v. Kennedy*, 9 Wall. 387; under the local prejudice act of 1867, in *City of Lexington v. Butler*, 14 Wall. 289; under the act of March 3, 1875, in *Claflin v. Insurance Co.*, 110 U. S. 81, S. C. 3 Sup. Ct. Rep. 507, —all decide against the proposition that sections 1 and 2 of the act of 1875 must be construed together, and that, when thus construed, the restriction upon the commencement of suits contained in section 1 applies to the removal of suits under section 2. The argument of counsel for the defendants, supported chiefly by the able opinions of Judges McCrary and Bunn, however persuasive it might be were this a case of first impression, cannot prevail against the well-settled decisions of the United States supreme court. The decisions of the circuit courts referred to were rendered prior to the decision of the supreme court in *Claflin v. Insurance Co.* This decision is conclusive of this question. It leaves this court but one course to pursue.

The motion to remand must be overruled.

SHELDRIK v. COCKCROFT.

SHELDRIK and Wife v. SAME.

(Circuit Court, D. Connecticut. May 24, 1886.)

REMOVAL OF CAUSES—BOND—COSTS.

Where the bond filed by the removing party does not provide "for paying the costs that may be awarded by the circuit court," as required by the act of March 3, 1875, § 3, the case is not properly removed, and must be remanded.

Motions to Remand.

John H. Light, for the motions.

Fredk. A. Hubbard, against the motions.

SHIPMAN, J. These are motions to remand to the state court. The two cases were removed under the provisions of the second and third sections of the act of March 3, 1875. Section 3 requires that the removing party shall make and file in the state court, with his petition, a bond, with surety, for entering, on the specified day, a copy of the record in the circuit court, "and for paying all costs that may be awarded by the circuit court if the said court shall hold that such suit was wrongfully or improperly removed thereto." Neither of the bonds in these cases contained any provision in regard to costs, but were in accordance with the requirements of section 639 of the Revised Statutes. "The filing of the bond, conditioned as required by the act of 1875, is a condition precedent to the removal of the cause to the federal courts." If the statutory requirements were not complied with, the cases were not properly removed, this court has no further jurisdiction, and the motions to remand must be granted. *Torrey v. Grant Locomotive Works*, 14 Blatchf. 269; *McLean v. St. Paul & C. R. Co.*, 17 Blatchf. 363; *Babbitt v. Clark*, 103 U. S. 606.

The motions are granted, with costs in one only of the cases.

ERWIN v. WALSH.

(Circuit Court, D. Connecticut. May 31, 1886.)

1. REMOVAL OF CAUSE—ORIGINAL JURISDICTION.

A suit in a state court, which falls within the description of suits removable into the circuit courts, may be removed, although it could not originally have been brought in that court.

2. SAME—JURISDICTION—AMOUNT.

Although the value in money of a right to appeal from the probate of the decedent's will cannot be appraised with exactness, yet as the right of the plaintiff in the estate, if it is intestate, is far more than \$500, and as the value

of that right depends directly upon the power to bring the question of the validity of the will before a court, the pecuniary value of the matter in dispute is sufficient to bring this case within the jurisdiction of this court.

Motion to Remand.

Frank L. Hungerford, for motion.

George G. Sill, against motion.

SHIPMAN, J. This is a motion to remand to the state court. The suit in the state court was a proceeding by *mandamus* to compel the defendant, a citizen of Connecticut, who is judge of the probate court for the district of Berlin, to allow the plaintiff's appeal to the superior court for the county of Hartford, from a decree of the said probate court approving the last will of C. B. Erwin, deceased. The petition and bond were filed in time, and are in proper form. The plaintiff, a citizen of Nebraska, removed the cause.

The defendant moves to remand because—

First. Circuit courts of the United States cannot, under the removal acts, take jurisdiction of appeals to the state courts from probate decrees approving or refusing to admit to probate the wills of deceased persons. This question, which is a difficult one, and which has not been determined by the supreme court, (*Fraser v. Jennison*, 106 U. S. 191; S. C. 1 Sup. Ct. Rep. 171,) it is not now necessary to decide, for it does not arise in this case. The proceeding is for a *mandamus* to compel the allowance of an appeal to the superior court,—*non constat*, that the appeal, if allowed, will ever be attempted to be removed to this court; and the question whether the plaintiff is entitled, under the statutes of the state, to an appeal to the state court is a very different one from that of the validity of a will upon such appeal.

Second. Because the circuit courts, by way of original, as distinguished from an ancillary, proceeding, "are not authorized to issue writs of *mandamus* unless they are necessary to the exercise of their respective jurisdictions." *Bath v. Amy*, 13 Wall. 244. This has frequently been said to be true by virtue of the fourteenth section of the judiciary act of 1789, (1 St. at Large, 81, 82,) with respect to the jurisdiction of this court in cases originally brought to it; but this court often has jurisdiction in a removed case which it could not exercise in cases originally brought before it. The court obtains jurisdiction of a case because, under the statutes, it can be and has been removed, and not because it is a case of which the court had original jurisdiction. "A suit in a state court, which falls within the description of suits removable into this court, may be removed, although it could not originally have been brought in this court." *Warner v. Pennsylvania R. Co.*, 13 Blatchf. 231; *Barney v. Globe Bank*, 5 Blatchf. 107; *Sayles v. Northwestern Ins. Co.*, 2 Curtis, 212. Thus, Mr. Justice MILLER held that a proceeding by *mandamus* in the state court, under the statutes of Kansas, to compel the defendant to register the transfers of stock held by the plaintiff, was

a "suit of a civil nature, at law," within the meaning of the act of 1875, and therefore could be removed to the United States court. *Washington Imp. Co. v. Kansas Pacific Ry. Co.*, 5 Dill. 489.

Third. Because it does not appear that the value of the petitioner's pecuniary interest in the proceeding is more than \$500. In *Kurtz v. Moffitt*, 6 Sup. Ct. Rep. 148, (October term, 1885,) it was held that writs of *habeas corpus* are not removable from a state court into a circuit court, under the provisions of the act of 1875, because "a jurisdiction conferred by congress upon any court of the United States, of suits at law or in equity, in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money." In this case the right of the plaintiff, a half-brother of the decedent, in his estate, if the latter died intestate, is easily capable of being valued in money, and is far more than \$500. There is no way of appraising with exactness the value in money of a right to appeal from the probate of the decedent's will; but as the value of the plaintiff's right in the estate directly depends upon the capacity to bring the question of the validity of his half-brother's will before the superior court, the pecuniary value of the matter in dispute in this controversy is sufficient to bring the case within the jurisdiction of this court.

Inasmuch as the parties are citizens of different states, and there is nothing in the nature of the suit which excludes or prevents this court from exercising jurisdiction, the motion to remand is denied.

SCHNEIDER and another v. Foote and another.

(Circuit Court, D. Connecticut. May 24, 1886.)

1. VENDOR AND VENDEE—RESCISSION—FRAUD—ELECTION.

In a bill in equity by a vendee for the rescission of a deed on the ground of the vendor's fraud and misrepresentation, relief in equity cannot be granted except the plaintiff have, within a reasonable time after the discovery of the fraud, elected to disaffirm the contract, and has, either before or at the trial, returned, or offered to return, the personal property received, and reconveyed, or offered to reconvey, the real estate of which he has the title.¹

2. SAME—BILL IN EQUITY—REPLEADER.

Where a complaint asking both damages and equitable relief against a vendor's fraudulent sale of real and personal property is removed to a federal court, and a bill in equity is filed therein for the equitable relief, and is tried, the action at law is not abandoned by the replader, but remains on the common-law side of the court.

3. SAME—RESCISSION—INJUNCTION—ACTION AT LAW.

A bill in equity asking for relief by the rescission of a deed, and of a note and mortgage given in part payment, on the ground of the vendor's fraud, and also by injunction restraining the transfer of the note and mortgage, although

¹ See note at end of case.

denied so far as regards the rescission, will be granted so far as regards the injunction, when the plaintiff has instituted an action at law for damages, which can be set off against the note and mortgage, and when the defendant is a non-resident, and not a property owner to any amount.

In Equity.

W. F. Wilcox, for plaintiffs.

Charles H. Briscoe and James P. Andrews, for defendants.

SHIPMAN, J. This suit was brought to the state court, the complaint alleging the defendants' fraud in the sale of real and personal property to the plaintiffs, and asking both for damages, and for equitable relief by a rescission of the deed, or of the note and mortgage which were given in part payment of the purchase price, and by an injunction restraining the transfer or assignment of the note and mortgage. The suit was removed to the circuit court, where the plaintiffs filed a separate bill in equity, the action at law remaining also in court. The bill in equity has been tried.

The facts are as follows: In January, 1884, Mrs. Caroline Foote had the legal title to a farm of 75 acres in Killingworth, in this state, which her husband, John H. Foote, had previously purchased for \$700, and had conveyed to his wife as a gift. Her husband, as her agent, and with her knowledge and approbation, concluded to sell the farm, and took measures to bring it to the attention of German immigrants to this country. In February, 1884, the notice of the two plaintiffs, who were Germans, one of whom had been in this country about nine months, and the other about six months, was called to the plaintiff's advertisement of the farm, one-half of which was represented to be clear, and the other half to be in woodland, and both went to see the defendant John H. Foote at his house in Brooklyn, New York. He praised the farm; said that it was one-half clear, and the other half woodland; that it had an ice-house, and that a good mowing-machine belonged to it; and the three went to Killingworth in a couple of days to examine it. Examination was necessarily imperfect, as there was snow upon the ground. The farm is an old, worn-out rough farm of 75 acres, of which only 10 or 12 acres, in the immediate vicinity of the house, are clear land, and are now capable of cultivation. The said John H. Foote pointed out to the plaintiffs, as embraced in and belonging to the farm, three lots of cultivated, cleared land, which he said were good grass lots, and a fourth lot which had been grown over with bushes. These lots, containing 12 acres, belonged to Norris Griswold. Said Foote also showed to the plaintiffs, as belonging to the farm, two cultivated, cleared lots, containing five acres, which actually belonged to Ezra G. L'Hommedieu. These six lots were near the defendant's dwelling-house, and adjoining her lots, and, if they had belonged to the farm, would have greatly enhanced its value. Said Foote also said that a certain ditch was the line, which included a little strip of said Gris-

wold's land. This incorrect representation was not of importance. He also pointed out as his own a mowing-machine which was under the shed, and which he said cost \$125. It belonged to Norris Griswold. The ice-house never existed, but said Foote said it could not be visited on account of the water upon the land where it stood. He told them that they could sell all their produce to the summer hotels, about a couple of miles off, and that a railroad was coming in the neighborhood which would enhance the value of the farm. There were and are no summer hotels within seven or eight miles or more of the farm, and no railroad was ever projected in its neighborhood. I omit the representations which he made of the condition of the buildings and of the land which really belonged to the farm, and of the wood upon it, and of the amount of hay which could be produced, and of the amount and value of cranberries which grew upon the farm, because they may be considered justifiable words of commendation, or false statements of opinion, which are not the subject of an action for deceit, or incorrect statements, the incorrectness of which could be discovered by the plaintiffs upon inspection.

The plaintiffs were entirely ignorant of farming or of farming land, were confiding and trustful, believed all that said Foote told them, and would not have bought said farm except for said ignorant and innocent trustfulness. They bought the farm, and the personal property specified in a bill of sale, which the said Caroline Foote executed for the sum of \$1,600; giving to her \$600 in cash, and their note for \$1,000, payable in five years from March 20, 1884, to her order, with 6 per cent. interest per annum, payable semi-annually, secured by a mortgage of said farm. By said bill of sale, the said Caroline purported to sell to the plaintiffs a mowing-machine and an ice-house.

Neither the market value nor the actual value of said farm, and of the personal property which was sold and delivered, exceeded \$700 or \$750. The misrepresentations of the said John H. Foote in regard to the farm, including the said lots of said Griswold and of said L'Hommedieu, and in regard to the mowing-machine and the ice-house, were influential in inducing the plaintiffs to buy the property. They were defrauded by the said Foote's intentional fraud, whereby they were deceived in essential particulars. They discovered the fraud, in regard to the non-ownership by the defendants of the Griswold and L'Hommedieu land, and of the mowing-machine, and the non-existence of the ice-house, in two or three weeks after they entered upon the premises, which was about the first of April, 1884. They wrote to one Thielke, a cousin of said Schneider, who lived in New York city, and who accompanied them when the first call upon the Footes was made, and also when the papers were executed, complaining of the difference in the cleared portion of the land, and in regard to the mowing-machine, who went to see Mr. Bischoff, the lawyer at whose office the papers were executed, who asked for the papers.

Thielke wrote to them to send the papers, but they were afraid to do so. They complained, in regard to the misrepresentations, to Mr. Foote in April and in June, and to Mr. and Mrs. Foote in September, 1884, but not earnestly or vigorously, and never requested a refund of the \$600, or a rescission of the contract. They paid the interest due in September, 1884, as it was due, but have not paid the interest due in March, 1885. They were entirely ignorant in regard to their rights until they were taken by one of their neighbors, and introduced to a lawyer some time in the early part of 1885. They did not tender a deed of the farm to the defendants either before or at the trial, and never disaffirmed or rescinded the contract except by bringing the complaint, which is dated April 8, 1885, and did not, before or after the first was brought, do or say anything to indicate that they did not wish to retain the property. On the other hand, a letter of theirs to the defendant, dated March 27, 1885, is inconsistent with the idea of disaffirmance.

The condition of the case is this: Both real and personal property were sold, by one agreement of sale, for a round sum. The plaintiffs were greatly defrauded by the intentional and fraudulent misrepresentations of one of the defendants, who was the husband and the known agent of the other defendant. The contract was not disaffirmed, except by the bringing of a complaint asking damages on account of the fraud and also equitable relief.

The rule of law in regard to the right of the vendee of real or personal property to rescind the contract on account of the vendor's fraud, or, affirming the sale, to bring an action for damages for the fraud, has been often given. It is stated in *Kellogg v. Denslow*, 14 Conn. 411, as follows:

"A sale may also be rescinded by the vendee, in a reasonable time, if the vendor is guilty of fraud in misrepresenting the article sold. But in all cases of fraud or warranty, where the vendee has the right of disaffirmance, he may keep silence, and bring his action in affirmance of the sale, either for the fraud or upon the warranty." *Whitney v. Allaire*, 4 Denio, 554; *Mallory v. Leach*, 35 Vt. 156; *Bigelow*, Fraud, 408, 413, 426, 427.

If any unpaid notes have been given to the vendor for the purchase, the damages arising from the fraud may be set up in partial or complete defense against the suit of the vendor upon the notes.

In this case, the prayer for a rescission of the deed cannot be granted, because it was incumbent upon the plaintiffs, within a reasonable time after the discovery of the fraud, to elect to disaffirm the contract, and, if such election may be considered to have been shown by the institution of the suit, it was also necessary for them, at some time, whether before or upon the trial it is not necessary to decide, to return, or to offer to return, the personal property which was received, and to reconvey, or to offer to reconvey, the real estate of which they had the title. An attempt, by the aid of a court of equity, to rescind the contract is ineffectual while the plaintiff is holding firmly

upon the property which is the subject of the contract. There must be not only an election to disaffirm, but the plaintiff must, so far as is practicable, revert in the vendor the title to the property which had been vested in the vendee by the voidable contract. *Pearsoll v. Chapin*, 44 Pa. St. 9; *Baker v. Lever*, 67 N. Y. 304. The note and mortgage cannot be canceled, because the attempt to cancel proceeds upon the ground that the contract for the sale of the property was voidable on the ground of fraud. If voidable, it must, as a general rule, be rescinded entirely, and there cannot be a partial rescission. "It is true that, generally, a part of a deed or contract or sale cannot be avoided without avoiding the whole." *Veazie v. Williams*, 8 How. 134. The decree in the *Veazie Case*, and which was not in accordance with the general rule, was an exceptional one, and proceeded upon the peculiar equities of the case, and upon the ground that in the contract there was a distinct line where fraud began and good faith ended.

So far forth as the bill in equity relates to rescission, no decree can be granted, but the plaintiffs must be remitted to their action at law for damages, without prejudice by reason of the refusal to rescind the contract. *Rogers v. Durant*, 106 U. S. 644; S. C. 1 Sup. Ct. Rep. 623. The original complaint was for both legal and equitable remedies. By the repleader in the equity part of the case, the action at law was not abandoned, but still remains on the common-law side of the court. *Fisk v. Union Pac. R. Co.*, 8 Blatchf. 299; *La Mothe Manuf'g Co. v. National Tube Works*, 15 Blatchf. 432; Dill. Rem. Causes, § 47.

Inasmuch, however, as the defendants are non-residents, and Mrs. Foote is apparently not a property owner to a large amount, and has the note for \$1,000, which is for a part of the purchase money, and can be transferred by indorsement to a *bona fide* holder, without notice of any alleged infirmity, it is right that the transfer should be prevented by injunction, so that the rights of the plaintiffs may remain unimpaired. The bill in equity, to that extent, should be sustained, and the temporary injunction should be made permanent. *New York Dry Dock Co. v. American Life Ins. & Trust Co.*, 11 Paige, 384.

NOTE.

The intention to rescind a contract must be manifested by some positive act. *Davidson v. Keep*, (Iowa,) 16 N. W. Rep. 101.

Where the evidence shows that a party was induced to make a certain purchase by false and fraudulent representations as to the value of the property, he is entitled to a decree for the cancellation of notes given as part consideration for the property. *Parks v. Burbank*, (Iowa,) 12 N. W. Rep. 729.

It is said in *Seeley v. Reed*, 25 Fed. Rep. 361, that a court of equity will decree a rescission of a contract obtained by fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representations, to his injury or prejudice.

Where a plaintiff comes into a court of equity asking for the rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum to be

liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. *Sutter St. R. Co. v. Baum*, (Cal.) 4 Pac. Rep. 916.

GUTHRIE and others v. HARKER and others.

(Circuit Court, N. D. Iowa, W. D. May Term, 1886.)

1. TAXATION—TAX DEED—STATUTE OF LIMITATIONS—CODE IOWA, § 845.

If the property owner allows five years from the execution of a tax deed to elapse, he cannot afterwards be heard to question the validity of the tax sale on the ground of the failure to make entry upon the tax-book of the years for which the taxes were unpaid.

2. SAME—DEED FROM TREASURER TO HIMSELF.

After the lapse of five years from the recording of a tax deed, in which time the property has been often transferred on the faith of said deed, one cannot complain that the deed was executed by the treasurer to himself.¹

In Equity. Bill to quiet title.

Barrett & Bullis, for complainants.

Joy, Wright & Hudson, for defendants.

SHIRAS, J. On the tenth day of November, 1859, a patent was issued by the United States to John B. Guthrie for the S. W. $\frac{1}{4}$ of section 29, township 97 N. of range 41 W., situated in O'Brien county, Iowa. John B. Guthrie died intestate in 1875, leaving a widow, son, and daughter, who are the complainants herein, and who file the present bill for the purpose of setting aside a tax title obtained upon the realty above described, and under which the defendants claim to be the owners of the land in controversy.

From the evidence it appears that on the thirtieth day of November, 1866, the treasurer of O'Brien county sold the premises to one H. C. Tiffey for the delinquent taxes of 1861, 1862, 1863, 1864, and 1865, and issued the usual certificate of sale to the purchaser, who subsequently assigned the same to A. Murray, by whom it was, on the sixth of May, 1868, transferred to C. W. Inman, who was then the treasurer of the county. On the thirtieth day of November, 1869, said Inman, as treasurer of O'Brien county, executed to himself, as owner of the certificate of sale, a deed to said premises, which was duly filed for record December 21, 1869. The present suit to set aside the tax deed, and quiet the title, was brought to the October term, 1885, and two facts are relied on as grounds for defeating the tax title: (1) That the tax deed was executed by the treasurer to himself; and (2) that the treasurer did not enter upon the tax-book the years for which the taxes were claimed to be delinquent, as required by section 845 of the Code of Iowa; it being expressly declared in said sec-

¹See note at end of case.

tion that "any sale for the whole or any part of such delinquent tax not so entered, shall be invalid." The defendants, who derive title through several intermediate conveyances from said Inman, rely upon the five-years limitation provided for in section 902 of the Code of Iowa.

It is admitted that the premises in question are uncultivated prairie lands, not in the actual possession of either party. On part of complainants it is claimed that the failure of the treasurer to enter the years for which the taxes were delinquent, upon the tax-book, as required by section 845, rendered the sale made absolutely void, so that, in effect, there was no sale of the land, and that consequently the five-year limitation has no application to the case.

If the question depended solely upon the provisions of section 845, it would be difficult to avoid the conclusion that sales made in contravention of its provisions are void; but this section is only one among several that apply to the subject-matter, and regard must be had to all the sections that are *in pari materia*. Taking into account the provisions of sections 897 and 902, can it be held that the invalidity named in section 845 may not be rendered unavailable to the property owner, if, without action on his part, he permits the three years to elapse after the sale, a deed to be executed to the purchaser entitling him to all the presumptions recited in section 897, and the lapse of five years after the execution and recording of the deed, thereby calling into effect the limitation of section 902? In the absence of countervailing evidence, the introduction of the treasurer's deed establishes the fact that the realty was subject to taxation; that the taxes were duly assessed and levied; that the same remained unpaid; that the property was sold for the payment thereof after due notice given; and that the same was not redeemed.

In the face of the provisions of section 897, can it be permitted to the property owner to show, after the due execution of the tax deed, that the treasurer had failed to enter upon his tax-book the years for which the delinquency in fact existed? This is a question which has not, so far, been decided by the supreme court of Iowa; and, in the absence of an authoritative construction of the statute by that court, I must decide it according to what seems to me to be the only fair construction that will give force to all parts of the statute. Section 897 sets forth, with particularity, the various facts which shall be deemed sufficient to defeat the title evidenced by a deed executed under the statute, but it does not include the failure to enter the years for which the taxes are delinquent upon the tax-book among the causes invalidating the deed. On the contrary, it declares that the deed shall be conclusive evidence "that all the prerequisites of the law were complied with by all the officers," etc.; and, further, "that the manner in which the listing, assessment, levy, notice, and sale were conducted, was in all respects as the law directed."

According to the provisions of section 845, if the treasurer fails to

make proper entry of the years for which the taxes are delinquent, upon the tax-book, a sale made therefor is invalid. If, however, the property owner does not avail himself of the invalidity, but permits a deed to be executed, then the provisions of section 897 come in force, and the deed becomes evidence that the steps necessary to constitute a sale of the property for delinquent taxes have been performed; and, if the property owner allows five years from the execution of the deed to elapse, he cannot afterwards be heard to question the validity of the sale on the ground of the failure to make entry upon the tax-book of the years for which the taxes were unpaid.

The other ground of objection to the tax deed, to-wit, that it was executed by the treasurer to himself,—it thus appearing that he was the owner of the tax certificate,—would present a grave question if the litigation was between complainants and said Inman. In view of the fact, however, that the deed was recorded in 1869, and no exception was then taken thereto, and that the land has been sold to several parties, who purchased relying upon the validity of the deed, and that the present defendants bought the land in 1881, long after the lapse of the five-years limitation, it must be held that it is too late to question the right of the treasurer to buy the certificate of sale, and to execute the deed to himself.

Decree for defendants.

NOTE.

The statute of limitations does not begin to run in favor of the holder of a tax deed by merely recording the same. To avail himself of the benefits of the statute, his possession must be actual and adverse, and continued for the statutory period. *Baldwin v. Merriam*, (Neb.) 20 N. W. Rep. 250.

The statute of limitations commences to run against defense to tax deed from date of sale. *Shawler v. Johnson*, (Iowa,) 3 N. W. Rep. 604. See *Clark v. Thompson*, 37 Iowa, 536.

In Wisconsin it is held that the fact that the tax deed issued is void does not prevent the running of the statute in favor of the holder. *Peck v. Comstock*, 6 Fed. Rep. 22. See *Milledge v. Coleman*, (Wis.) 2 N. W. Rep. 77; *Edgerton v. Bird*, 6 Wis. 527; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 246; *Lawrence v. Kenney*, 32 Wis. 281; *Wood v. Meyer*, 36 Wis. 308; *Marsh v. Supervisors*, 42 Wis. 502; *Philleo v. Hiles*, Id. 527; *Oconto Co. v. Jerrard*, 46 Wis. 324.

UNION MUT. LIFE INS. Co. v. HANFORD and others.¹

(Circuit Court, N. D. Illinois. April 5, 1886.)

1. STATUTE OF LIMITATIONS—SUIT ON PROMISSORY NOTE, WHEN BARRED.

Suit on promissory note is not barred, under Illinois statute, until 10 years from maturity of note.

2. MORTGAGE—MORTGAGOR'S PERSONAL LIABILITY, WHEN DISCHARGED.

Where grantee of mortgagor assumes payment of mortgage debt, and obtains from mortgagee extension of period for payment, mortgagor is discharged from personal liability to mortgagee.

¹ Edited by Russell H. Curtis, Esq., of the Chicago bar.

Swett, Groscup & Swett, for complainant.
Fairchild & Blackman, for defendants.

BLODGETT, J. This case now comes before the court upon an application for a deficiency decree to be entered against the defendants, Philander C. Hanford, Orrin P. Chase, and Lucy Duncan Fake. The original bill was for the foreclosure of a mortgage given by the defendants Hanford and Chase to Jacob L. Schureman, bearing date September 9, 1870, upon certain property in the city of Chicago, to secure the payment of three notes: one for \$5,000, due in one year from the date of said mortgage; one for \$5,000, due in two years from that date,—each of said notes bearing interest at the rate of 8 per cent. per annum; and one note for \$6,000, payable in three years from said date, and bearing interest at the rate of 10 per cent. per annum. Such steps were taken in the suit as that a decree of foreclosure was entered May 10, 1879, finding the amount of the mortgage debt at that time to be \$15,881.67, and directing the sale of the mortgaged premises by one of the masters of this court at public auction for the purpose of making the amount of said indebtedness. At the master's sale, made in pursuance of this decree, the mortgaged premises brought the sum of \$12,000, from which, after the payment of costs and expenses, the sum of \$11,716.12 was applied upon the mortgage debt, leaving a deficiency of \$4,284.65, for which a deficiency decree was entered against the defendants Hanford and Chase, October 27, 1880; afterwards, upon the application of Hanford and Chase, and on the suggestion that the report of the receiver appointed in said case had not been filed, and that there were still funds in his hands to be applied on the mortgage indebtedness, that decree was set aside, with leave to the complainant to apply for a deficiency decree at a future day, whenever the receiver's account should be adjusted. This account has been adjusted, and shows a balance in the hands of the receiver of \$64.49, which should have been applied upon the deficiency shown by the master's report, which would have made the deficiency at that time \$4,220.16. The complainant now moves for a deficiency decree against these defendants, and the defendant Lucy D. Fake. The defendants Hanford and Chase resist this application, and insist that no deficiency decree can or should be entered against them for the following reasons: *First*, because the statute of limitations has barred the debt as a personal liability; *secondly*, because the complainant has so dealt with the mortgage indebtedness as to release the personal liability of said Hanford and Chase.

As to the statute of limitations, I do not see any good ground upon which this defense can be supported. The indebtedness was by promissory notes, which are not barred by the Illinois statute until 10 years from the time they mature, the last of which matured on September 9, 1874, and the bill in this case was filed in 1878,

and since that time the case has been in court continuously, and complainant has been seeking a decree—*First*, for foreclosure against the mortgaged premises; and, *secondly*, a personal decree against these defendants; and is not responsible for the delay of the proceeding, and has lost none of its rights by reason of such delay.

It appears from the testimony that, after the making of the notes and mortgage in question, defendants Hanford and Chase, before January 30, 1871, paid the first note of \$5,000 mentioned in the mortgage, and on January 30, 1871, Schureman, the mortgagee, sold and assigned the notes and the mortgage to the complainant for a valuable consideration, and duly indorsed the notes, and transferred the mortgage in writing to complainant. It further appears that on September 9, 1872, the defendants Hanford and Chase conveyed the mortgaged premises to Lucy Duncan Fake by their warranty deed of that date, in which deed, immediately following the covenant of warranty, occurs the following clause:

"With the exception of and subject to a certain mortgage or trust deed, bearing date September 9, 1870, made and executed by Orrin P. Chase and Philander A. Hanford to Jacob Schureman, and upon which is, at the date hereof, unpaid the sum of \$11,000, and interest from September 9, 1872, which said mortgage or trust deed was assigned to the Union Mutual Life Insurance Company of Boston, Massachusetts, on the thirtieth day of January, 1871, which said mortgage or trust deed, and the notes to which the same is collateral security, made and executed by Orrin P. Chase and Philander C. Hanford to the order of Jacob L. Schureman, it is hereby expressly agreed shall be assumed and paid by the party of the second part."

Prior to making the conveyance to Mrs. Fake, Hanford and Chase had negotiated with Dr. L. D. Boone, the agent of complainant in the city of Chicago, an extension of part of said mortgage indebtedness; so that the \$5,000 note, which matured, by its terms, September 9, 1872, was extended to September 9, 1874; and after the conveyance to Mrs. Fake, about September 9, 1873, a further extension was negotiated between the complainant's agent, Dr. Boone, and F. L. Fake, as agent for Mrs. Lucy D. Fake, by which the time for the payment of the two notes, one for \$5,000 and the other for \$6,000, was extended until September 9, 1875. This extension was obtained without the consent or concurrence of Hanford and Chase, and they now insist that such extension has released them from liability upon the notes, because the complainant has dealt with Mrs. Fake as the principal debtor in the transaction, on her assumption of the mortgage debt, and has by such extension released them from liability.

Defendants Hanford and Chase, in support of their defense, introduce proof tending to show that the property covered by the mortgage diminished greatly in value between the ninth of September, 1874, when the last of the notes fell due under the extension obtained by them from complainant, and the time of filing the bill of foreclosure; and the master has found, as one of the facts in the case, that the value of the mortgaged premises in September, 1874, was from

eighteen to nineteen thousand dollars, while the value of the same premises on April 4, 1879, was from ten to fifteen thousand dollars only.

It is contended by Hanford and Chase that the legal effect of this dealing by complainant with Mrs. Fake was to change their relation to the indebtedness from that of principal debtors to that of sureties, and that, as such sureties, they have become released by the extension of time given to Mrs. Fake, the principal debtor; and the case of *Calvo v. Davies*, 73 N. Y. 211, is cited and relied upon in support of this position. I have read this case carefully, and think there can be no doubt that it fully sustains the position taken by these defendants, and the rule established by this case is quoted with approval in *Jones on Mortgages*, 742. The contrary rule is, however, held in *Corbett v. Waterman*, 11 Iowa, 86, and *Waters v. Hubbard*, 44 Conn. 340. It seems to me, however, that the case of *Calvo v. Davies* is fully sustained by a uniform line of decisions in the New York courts tending to the final conclusion of that case, and the rule of that case may be said to be sanctioned by the better authority. It has been repeatedly held in this court that a mortgagee can maintain an action of *assumpsit* for the mortgage indebtedness, against a purchaser of the equity of redemption who has assumed and agreed to pay the mortgage. *Twichell v. Mears*, 8 Biss. 211. I therefore conclude, in the light of these authorities, that the complainant has so dealt with Mrs. Fake as to work a release of Hanford and Chase from their personal liability on the indebtedness, and that no decree for the deficiency should be entered against them.

Complainant is entitled to a decree against Mrs. Fake for the amount of the deficiency, if it chooses to take it.

IRONS and others v. MANUFACTURERS' NAT. BANK and others.¹

(Circuit Court, N. D. Illinois. June 1, 1886.)

1. BANKS AND BANKING—NATIONAL BANKS—STOCKHOLDERS' LIABILITY—CREDITORS SHARE EQUALLY.

In a suit in chancery, under the statute of June 30, 1876, by a creditor of a national bank on behalf of himself and all other creditors, against the stockholders of such bank, to enforce their individual liability for the payment of claims against the bank, the fund obtained is a part of the general assets of the bank, and all creditors of the bank stand upon an equal footing in the distribution of it.

2. SAME—ALL CREDITORS MAY TAKE BENEFIT OF BILL—RUNNING OF STATUTE OF LIMITATIONS STOPPED.

A bill filed under the statute of June 30, 1876, by a creditor of a national bank, against stockholders of such bank, to enforce their individual liability, is for the benefit of all creditors of the bank, although it does not contain an averment of that fact; and filing such a bill stops the running of the statute of limitations upon all claims against the bank.

¹Edited by Russell H. Curtis, Esq., of the Chicago bar.

3. SAME—DISCHARGE IN BANKRUPTCY, WHEN RELEASE OF STOCKHOLDER'S LIABILITY.

A discharge in bankruptcy releases a shareholder of a national bank from his statutory individual liability to creditors of the bank, where, at the time of his discharge, the claims of such creditors were *provable*, not merely *contingent*.

4. SAME—STOCKHOLDER OF RECORD IS LIABLE.

Person who appears upon the records of a national bank to be a stockholder at the time the bank becomes insolvent, is subject to statutory personal liability of shareholder, although he has previously, in good faith, sold his stock.

5. SAME—BANK IN LIQUIDATION—GUARANTY BY PRESIDENT.

After a national bank has, by its shareholders, decided to go into liquidation, its president, upon giving paper held by the bank to creditors of the bank, as collateral security for their claims, has authority to indorse or guaranty such paper in the name of the bank, so as to bind the bank and its shareholders.

6. SAME—ALL CREDITORS ON SAME FOOTING.

Creditors of national bank in liquidation, who received, as collateral, paper guaranteed by the bank, and who have obtained judgments against the bank on its guaranty, stand on basis of general creditors, and should receive only the amount due them by the books of the bank when it suspended, less payments and amounts collected from collaterals, with legal interest upon the unpaid balance.

In Chancery.

Schuyler & Kremer and Mason Bros., for complainants.

H. B. Hurd, H. G. Miller, and Jonas Hutchinson, for defendants.

BLODGETT, J. This case is now before the court upon the master's report, made under a decree entered July 3, 1883, whereby he was directed to take proof and report the amount of the debts of the bank still unpaid, and the amount due each creditor thereof; the value of the assets of the bank, if any, aside from the individual liability of the shareholders; and the amount of assessment necessary to be made on each share of capital stock in order to fully pay the indebtedness of the bank. See 17 Fed. Rep. 308. By this report the master has found there is still due and unpaid to the creditors of the bank the sum of \$368,971.50 for the principal and interest of said indebtedness up to November 1, 1884; that said bank has no assets or funds out of which to pay said indebtedness, except the individual liability of its shareholders, and that said indebtedness requires an assessment of 90 per cent. upon the capital stock of said bank held by the respective shareholders. To this report voluminous exceptions have been filed by several of the shareholders, and upon the argument of these exceptions much of the ground which was considered and discussed upon the former hearing had been again examined. The professional standing of counsel, and their earnestness in pressing a rehearing of their points, has caused me to again consider the questions made, and to some extent review the conclusions announced at the time the interlocutory decree was entered.

As I understand the counsel, they insist that, under the law as it stood at the time the bank suspended, the remedy of the creditors of the bank was by a suit at law against the shareholders; and while

they concede that by the amendment of the national banking act of June 30, 1876, jurisdiction was given to a court of equity, upon a bill filed by any creditor, to enforce the liability of the stockholders, yet they claim that the statute of limitations which they have pleaded in the case began to run from the suspension of the bank in September, 1873; and that as the bill in this case, until the amendment in July, 1883, never professed on its face to be filed by the complainants in behalf of themselves and all other creditors of the bank, therefore all debts of the bank but three had become barred by the statute of limitations before a proper bill was filed to enforce the shareholders' liability. I think the fallacy of much of the argument in this case results from the assumption that the provisions of the banking law, in regard to the enforcement of the individual liability of the stockholders for the payment of debts, is to be construed and governed by the rules in regard to the statutory liabilities of the stockholders in state corporations. There are many cases cited in the briefs of counsel showing, in substance, that the liability of the shareholder of a corporation is not an asset of the corporation, and that such individual liability is to be enforced by suit brought by the creditors directly against the shareholders. This rule was announced by Judge WALLACE in *Jacobson v. Allen*, 12 Fed. Rep. 455; *Story v. Furman*, 25 N. Y. 231; and many other cases which might be cited. The national bank act, however, specifically provides that a receiver, when appointed by the comptroller, shall enforce the individual liability of the shareholders, pay the money over to the treasurer of the United States subject to the order of the comptroller of the currency, and that the comptroller shall, from the proceeds of the property of the bank, and the proceeds of the individual liability of the shareholders, make equal and rateable dividends to the creditors; and, as the act of June 30, 1876, provides that the individual liability of the shareholders may be enforced by a bill in equity filed by any creditor in behalf of himself and all other creditors, it implies that the fund obtained by the enforcement of the statutory liability of the shareholders shall go in with the general assets of the bank, and be equally distributed to all. As the law stood prior to the passage of the act of June 30, 1876, the individual liabilities could only be enforced through a receiver appointed by the comptroller of the currency, (*Kennedy v. Gibson*, 8 Wall. 498;) and in providing for the enforcement of this liability through the medium of a bill in equity brought by a creditor, this rule of distribution is not changed, and it is clear that each creditor is to share alike in the proceeds of such bill.

It is further urged that this bill did not become a proper bill, within the terms of the statute of 1876, until the amendment of July 23, 1883, at which time a clause was inserted stating that the bill was filed by complainant in behalf of himself and of all other creditors. The original bill in this case was strictly and technically a creditors' bill, filed by James Irons as a judgment creditor of the

bank, and seeking to obtain possession of the legal and equitable assets of the bank, and to prevent waste by the officers of the bank then in possession of them. It did not seek to enforce the shareholder's liability, nor seek for any decree in that regard. After the passage of the act of June 30, 1876, an amended and supplemental bill by leave of court was filed, in which it was attempted to enforce the shareholder's liability. Some of the allegations in the prayer of this amended and supplemental bill indicate that the pleader who drew it was still of opinion that the complainant would have a right to priority of payment by reason of diligence in the commencement of the proceeding, and this bill contained no clause or statement that it was filed in behalf of the complainant and all other creditors. It seems to me that this clause in the bill was entirely unnecessary, and that, being filed under the statute which directed that it could only operate in behalf of complainant and all other creditors, the law gave direction and force to all that could be done under it, and that the provision of the act of 1876 authorizing the filing of this bill is not to be considered as a rule of practice, or a rule for the framing of the bill, but as a rule defining the rights of parties under such a bill; and that whether such a bill professed upon its face to be filed in behalf of complainant and all other creditors, the court would give it such direction and force, and no other; and that hence, from the time this amended and supplemental bill was filed, in October, 1876, it has been a proper bill under which to enforce the individual liability of these shareholders. Taking this view of the case, I therefore conclude that when this amended and supplemental bill was filed it brought all the creditors of the bank before the court, and was a bill for their benefit as much as if they had all been complainants or parties to it in any form; and that therefore, if the statute of limitations had begun to run in favor of the bank against its creditors, the filing of this bill was the bringing of a suit by each creditor so as to suspend the running of the statute. For the purposes of asserting their rights it was not necessary, I think, for creditors to intervene and make themselves parties to this proceeding, but the court, looking upon this as a special case of statutory jurisdiction, would consider the bill as a suit by each creditor for the purpose of enforcing the collection of his debt.

The question as to the effect of the decree of the discharge in bankruptcy, interposed by the defendants Ira Holmes, Edgar Holmes, M. D. Buchanan, and Pope, has also been rediscussed, and the case of *Garrett v. American File Co.*, 110 U. S. 288, S. C. 4 Sup. Ct. Rep. 90, (decided and reported since this question was formerly up,) is now presented as holding a contrary rule from that which I adopted in disposing of these pleas; but after an examination of that case I do not see that it should in any way be allowed to change the conclusion which I have heretofore announced. The decision upon these pleas was placed mainly upon the peculiar facts in the record.

It appears, as I have already said, that the bill to enforce the liability of the shareholders of this bank was filed October 5, 1876. These four shareholders did not get their discharges, and their estates were not closed, until long after this amended and supplemental bill was filed. Their individual liability as shareholders of this bank, whatever it was, had become fixed. The debts of the bank were a fixed quantity. The amount of stock which these shareholders respectively owned was easily provable, and the complainant, or the receiver who had been appointed under the original bill in the case, might have proven this claim for individual liability against the estates of these bankrupts at any time after this bill was filed. It could have been proved in the name of this complainant creditor, or in the name of the receiver. It is true, an assessment had not been actually made, but a bill had been filed which must sooner or later result in an assessment, and a tentative proof could have been made; and hence I think this claim of liability was a provable claim, and not a contingent claim, at the time these proceedings in bankruptcy were commenced. It may be that a shareholder in a solvent bank, continuing in the due course of business, and where the question of his ever being made liable is a remote contingency, would not be released from liability by a discharge in bankruptcy; but in this case the only contingency there was consisted merely in the amount of assessment which would be required upon these shareholders, and a court in bankruptcy could have heard proof as to the amount of the debts of the bank, and the amount of stock, in order to settle the amount of the shareholders' liability.

Counsel for Mr. Charles Comstock have reargued at length the question of the good faith of the transfer of his capital stock. The proof shows that Mr. Comstock appeared by the records of the bank to be the holder of 150 shares of its capital stock on the day the bank closed its doors; but it is claimed that the proof in the case shows that as early as February, 1873, Mr. Comstock sold 50 shares of his stock to Ira Holmes, and that in June, 1873, he sold 50 shares more; but that, owing to inadvertence or neglect, no transfer was made upon the records or books of the company; and no change of ownership of stock was actually made until the day before the bank suspended, when the original stock was canceled, and new certificates issued to the purchasers. I conclude that, for the purpose of determining the individual liability of a shareholder for the debts of a national bank, he must be construed and held to be such shareholder up to the time there is an actual transfer of his stock upon the books of the bank. So long as the man appears upon the books of the bank to be a shareholder, the presumption of law is that the debts of the bank are contracted upon the faith of his liability as such shareholder; and while it may be a hardship upon Mr. Comstock to enforce this individual liability as to shares which he may have sold in good faith several months before the failure, and when the bank

was in good credit, and with no intention of perpetrating fraud, yet, at the same time, he was the only person, in the eye of the law, at least, to whom the creditors of the bank will be presumed to have looked for the purpose of giving credit to the bank, and therefore it is his misfortune if he delayed change of title until insolvency intervened.

It is further urged, in support of some of the exceptions taken, that the proof in the case shows that a large number of the debts of the bank which have been reported by the master have been actually paid out of the assets of the bank, and therefore no longer form a claim against the bank, or against the shareholders. The facts, as I gather them from the proof in the record, are briefly these: The bank, by a resolution of its stockholders, went into liquidation on the twenty-fifth of September, 1873. Ira Holmes, president, was left in charge of its assets, and immediately proceeded to settle with the creditors. The bank had some money, and a large amount of commercial paper, and owed a large amount to its depositors and other creditors. Mr. Holmes made settlements with a great many of these creditors by paying them some money, and turning out to them the commercial paper of the bank. It is now insisted that the testimony of Mr. Holmes shows that this paper was taken in payment of the indebtedness of the bank. It appears, however, that in all cases he either indorsed the commercial paper in the name of the bank, or guarantied it in the name of the bank; and in many cases suits have been brought against the bank upon the guaranties and indorsements thus made, and judgments rendered which have formed the basis of the proof upon which the master has found the amount of indebtedness of such creditors. And it is further urged that Mr. Holmes, from the time the bank went into liquidation, had no authority to bind the bank by an indorsement or guaranty; and that, therefore, these judgments, rendered upon such indorsements and guaranties, are void and inoperative as against shareholders. I am satisfied, however, from the proof, that the creditors who took the commercial paper of the bank did not take it in payment of the indebtedness due them from the bank, but took it as collateral to such indebtedness; and that only so far as such paper has proved collectible, and been made available by such creditors, should it be deemed a payment of the bank's indebtedness. I do not think the proof justifies the assumption that the creditors of the bank took this paper as absolute payment of their demands, but that they took it to be collected and applied upon their debts.

But if I had any doubt as to the terms on which these creditors took this paper, I should still deem the bank liable, because I have no doubt that Mr. Holmes, the chief executive officer of the bank, had the power to bind the bank and the shareholders by indorsements or guaranties, in the due course of business, as well after the vote to go into liquidation as before. *Bank v. Insurance Co.*, 104 U. S. 54;

People's Bank v. National Bank, 101 U. S. 181. Turning over this commercial paper upon the debts of the bank was not the contracting of a new debt, but an attempt to satisfy an old one; and the indorsements or guaranties of the paper only operated to keep the obligation of the bank alive, and give the holder recourse over against the bank in case the paper turned over was not collectible. The report of the master shows that, for the purpose of ascertaining the amount due each creditor, he took the judgments which had been rendered in favor of very many creditors against the bank on these guaranties and indorsements as the amount due such creditors, and has computed interest upon such judgments up to the time fixed in his report, for the purpose of determining the amount now due; while in the case of creditors who have not brought suit, the amount due them is ascertained by simply taking their credit balance from the books of the bank, and computing interest from the day the bank suspended, at the rate of 6 per cent. per annum. In these suits upon indorsements and guaranties judgment was rendered against the bank for the amount due on the indorsed or guarantied paper, with interest thereon, and often at the rate of 10 per cent. from the time such paper was given, or from the time it was turned out to the creditors, whereby such creditors have obtained a compounding of interest upon their claims, thus giving to these judgment creditors an unequal claim as against the creditors who have not put their claims into judgment. I am, however, of opinion that the master, for the purpose of ascertaining the amount due each creditor, should have taken the amount shown to be due such creditor by the books, and, after deducting from that amount any payments which were made to the creditor by the bank, or collected by him from paper which he accepted, he should be allowed credit for the balance of such indebtedness from the date of the suspension of the bank to the time the account was taken, and thereby all creditors would be placed upon an equal footing. The case will therefore be again committed to the master, with directions to ascertain and report the total amount of the indebtedness of the bank at the time of its suspension, and the amount which has been paid on such indebtedness since that time; and to compute interest on the balance of such indebtedness remaining unpaid up to the first day of the present month of May; and report the aggregate amount of the same, with a finding as to the percentage which must be assessed against the shareholders for the purpose of paying such indebtedness, together with the costs of the receivership.

The exceptions to the master's report are overruled, except in so far as they are impliedly sustained by this re-reference to the master.

WESTERN LAND & CATTLE Co., Limited, v. PLUMB and others.¹

(Circuit Court, N. D. Illinois. May 24, 1886.)

1. AGISTMENT—CONTRACT TO FEED CATTLE CONSTRUED.

Contract, which provides that contractor shall take certain cattle to his farm; that he shall feed and fatten them there until certain date; that he shall be liable for all losses of such cattle from death, disease, escape, or theft at a fixed price per head; that he waives any lien on said cattle as an agister, or in any other character; that contractee shall sell said cattle; and that contractor shall receive, in full for his services, price realized at sale in excess of fixed sum per head and expenses of sale,—construed not to give contractor title to said cattle nor right to sell them.

2. SALE—BONA FIDE PURCHASER FROM APPARENT OWNER, WHEN PROTECTED.

A creditor who takes a conveyance of personal property merely in payment of a pre-existing debt is not a *bona fide* purchaser, within the meaning of the Missouri statute for the protection of *bona fide* purchasers from apparent owners in possession. Such statute (Rev. Code Mo. § 2507) provides that, where purchaser of personal property has possession, a condition in the contract of sale for the retention of title in the seller until the completion of the payment of the purchase money is void against subsequent *bona fide* purchasers and creditors, unless such sale is evidenced by written contract executed and recorded as in the case of mortgages of personal property.

3. SAME—UNITING IN FRAUD WITH APPARENT OWNER FORFEITS PROTECTION.

Laws of Missouri in relation to recording chattel mortgages, or conditional titles to personal property, protect only persons dealing in good faith with apparent owner in possession. They do not protect one uniting with apparent owner in fraud upon true owner.

McCoy, Pope & McCoy, for plaintiff.

R. A. Childs, for defendants.

BLODGETT, J. This suit was tried before the court without the intervention of a jury. It is an action of replevin, involving the ownership and right to the possession of 79 head of beef cattle. The material facts, as they appear from the proof, are that on or about the eighth of November, 1884, the plaintiff was the owner and in possession of 150 head of beef cattle, designated as Colorado steers, and on that day entered into a contract with one J. W. Moad by which Moad was to take the cattle to his farm in Caldwell and Ray counties, Missouri, and there to properly feed, fatten, and care for them for the purpose of their being profitably marketed by plaintiff; that Moad should be liable for all losses of such cattle from death, disease, escape, or theft at an agreed value of \$44.86 per head; that the time of feeding should extend to the first of June, 1885; that the cattle were to be sold or shipped for sale by plaintiff; and that Moad was to receive, as full compensation for his care and feeding of the cattle, all moneys realized by plaintiff on the sale of the cattle over the sum of \$44.86 per head, after deducting all costs and expenses of shipment and sale, and Moad expressly waived all lien on the cattle, either as an agister or of any other character. In removing the cattle

¹ Edited by Russell H. Curtis, Esq., of the Chicago bar.

from the vicinity of Kansas City, where they were at the time the contract was made, to Moad's farm, eight head escaped, and were subsequently recovered and returned to Kansas City, where they were sold with the knowledge of Moad, and proceeds paid to plaintiff. Seven head were either disposed of by Moad or died, so that on the nineteenth of June there remained in Moad's possession 135 head, and on that day he drove them from his farm in Ray county to Breckinridge, a railroad station a few miles distant, and there delivered the cattle to one J. W. Plumb. Fifty-six head of them, it was claimed, were sold to Plumb, and the remainder, seventy-nine head, were delivered to Plumb as agent of J. D. Cox. Plumb shipped the cattle, on the night of the 19th, by railroad for Chicago, and plaintiff, being notified of the removal of the cattle, caused them to be replevied very soon after their arrival at the stock-yards in this city. A settlement has since been made between plaintiff and Plumb in regard to the 56 head which Plumb claimed to have bought of Moad, and the contention left for trial is only in respect to plaintiff's ownership of the 79 head, which it is claimed had been sold by Moad to J. D. Cox, or to the Caldwell County Bank of Kingston, Missouri, of which Cox was the president and active manager. It also appears that, at the time the contract between plaintiff and Moad was made, the sum of \$44.86 per head, which was to be the amount of plaintiff's interest in the proceeds of each when sold, was arrived at by taking \$42 as their value per head when the contract was entered into, and computing interest thereon at the rate of 12 per cent. per annum to the first of June, when the cattle were to be sold.

It further appears that for two or three years before the contract in question was made, Moad had been, to some extent, engaged in dealing in cattle; that he had begun with a few thousand dollars' capital, and, while at first successful, his transactions for a year or more before the time this contract was made with plaintiff had been so unprofitable that his original capital and profits had been substantially lost, and for about a year he had been in debt to Mr. Cox, or to the bank of which Mr. Cox was president, to an amount between \$4,000 and \$5,000, which he had from time to time secured by chattel mortgages on steers, horses, mules, etc., which he had, or claimed to have, in Ray, Caldwell, and other counties in Missouri; that notwithstanding he had so mortgaged such live-stock, Moad had, without the knowledge or consent of Cox, sold the steers which were the most valuable and available portions of the property covered by such mortgages, and applied the proceeds to his own use, and about the twenty-seventh of February, 1885, Moad made a new chattel mortgage, upon the cattle now in question and other farm stock, to the bank to secure his note for \$366.60, dated February 27, 1885, and another note of \$3,633.50, dated October 31, 1884, which last mentioned note had been secured by a former chattel mortgage on the steers which Moad had sold. No money was paid by Cox or the bank to Moad at the time

this chattel mortgage of February 27, 1885, was taken; but it was either at that time or afterwards verbally agreed between Moad and Cox that, when the cattle were ready for market, Moad should ship them to market in Cox's name, and that, when sold, the proceeds were to be applied on the indebtedness due from Moad to the bank. It also appears, I think, quite satisfactorily from the testimony of Mr. Cox that he knew of Moad's financial embarrassment, and I am also satisfied, from the testimony of Moad and Cox, that Moad understood or knew he had made himself liable to a heavy penalty by selling the steers after he had mortgaged them to the bank, and that his only hope of escaping punishment was by in some way satisfying the debt due from him to the bank; that is, while there is no direct proof in the case that either Cox, or any one in behalf of the bank, made any direct threats of prosecuting Moad for selling the steers he had mortgaged to the bank, yet it is quite clear from the proof that Moad acted upon the assumption that he was in peril of such prosecution unless his indebtedness to the bank was paid. It further appears that the cattle in question were kept, for a couple of months after they came into Moad's possession, upon his father's farm, in Caldwell county, Missouri, and were then moved to a farm in Moad's possession in Ray county, where they were at the time the chattel mortgage of February 27th was given, and where they remained until they were driven to the railroad station for shipment.

It is clear from the proof that neither Cox nor the bank ever advanced any money to Moad after he came in possession of the cattle in question, and that the transaction between Cox, the bank, and Moad was in effect an agreement to turn over these cattle, or the proceeds of them, to the bank, or to Cox for the bank, in payment of an antecedent debt due from Moad to the bank.

It is claimed by defendant that the contract between plaintiff and Moad, when considered in the light of the accompanying facts, must be treated as a sale of the cattle to Moad for \$44.86 per head, to be paid when the cattle were sold; that Moad was in effect the purchaser of the cattle, to be paid for at the price named by the first of June, or when the cattle were sold and the proceeds realized.

Upon its face the contract purports to be a feeding or agistment contract; the cattle were to be marketed by the plaintiff; Moad was to receive, for his compensation for the care and feeding of the cattle, all the net money realized by plaintiff from the sale of the cattle over \$44.86 per head; and I see nothing in the conduct of the parties, either before or after the contract was made, inconsistent with the plain meaning of the contract. It is true that the proof shows that Moad wanted to buy the cattle, and plaintiff put a cash price upon them of \$42 per head. Moad then stated that he had no money to buy cattle with, but had plenty of corn and fodder to feed them, and proposed to buy them on credit, but plaintiff declined to sell them on credit, but proposed to give him a feeding contract in which plaintiff

should retain title to the cattle, and give Moad what the cattle should sell for over \$44.86 per head after feeding them to the first of June; and these terms were agreed upon, and embodied in the contract; the right of the plaintiff to market the cattle being fully provided for. It is urged, however, that when the eight head of cattle that escaped between Kansas City and Moad's farm were recovered and brought back to Kansas City, they were, by plaintiff's direction, sold for account of Moad; but the contract provided that Moad should be liable for all cattle that should escape, at the fixed price of \$44.86 per head, and when these cattle were recovered and brought back to Kansas City by a man in Moad's employ, they were properly sold for account of Moad. If they had brought more than the stipulated price per head, the surplus would have belonged to Moad. They did not bring any surplus, but there was a balance left due, and Moad paid this balance to the brokers who sold the cattle, thus fully ratifying the sale and application of the proceeds.

It also appears that the plaintiff, during the winter, had occasion to borrow some money from a mortgage and investment company doing business at Kansas City, and placed this contract with Moad as collateral security, and that a clerk of the investment company sent a notice to Moad in May stating that his note would be due June 1st. But the proof shows there was no note given by Moad with this contract, and the contract does not call for any specific sum of money to be paid by Moad; and, although this notice bears the name of J. A. Forbes, the manager of the plaintiff company, who was also the manager of the investment company, yet it is a printed form with a printed signature, and was undoubtedly filled up and sent by some clerk of the investment company who knew nothing of the transaction, and certainly had no right to construe or give a meaning to the contract.

It also appears that in March, Mr. Forbes, the manager of the plaintiff company, wrote a letter to one of his employees, who was then at Moad's place, in which he states that he is sorry to learn that Moad fears he will not make money on the cattle, and suggests whether Moad had not better pick out the best and sell them earlier than was first intended, and thereby reduce the expense and save interest. This reference to saving interest defendant claims is only consistent with the assumption that Moad was a purchaser of the cattle from plaintiff, and was to pay interest on the purchase price. Mr. Forbes in his testimony explains the matter by saying that their cash price for the cattle, at the time the contract was made, was \$42 per head; Moad was to feed them till June 1st, and have what the cattle brought over \$44.86, which sum was arrived at by computing interest on the \$42 per head at the rate of 12 per cent. per annum to June 1st; and if, at his suggestion, any of the cattle were sold before that time, this rate of interest should only be computed to the time when the sale was made and proceeds realized.

The transaction, then, seems to me to be clearly this, and nothing more or less: Plaintiff had the cattle for sale on the Kansas City market at \$42 per head, cash. Moad wanted to buy them on credit at that price. Plaintiff refused to sell them to him on credit; but, on his statement that he wanted to buy cattle to feed because he had a large supply of feeding material on hand, proposed to let him have the cattle to feed, upon a feeding contract in which plaintiff should have the right to market them, and out of this proposal grew the written contract now in question. I have no doubt that the true intent of the parties is expressed by its terms; that it was intended to be, as it purports to be, a feeding contract, in which Moad became a mere bailee of the steers in question for the purpose of feeding or caring for them, and that his compensation for the feeding and care was to be what the steers should sell for over the stipulated price per head; that is, Moad was to have the profit on feeding the cattle above 12 per cent. Moad did not understand from the contract itself, nor from the negotiations that led up to the contract, nor from what took place afterwards, that he was the purchaser of the cattle, and had the right to dispose of or sell them.

It is, however, urged that, under the laws of Missouri where the contract was made and was to be executed, the legal effect of the contract was to clothe Moad with the apparent ownership; so that, as between him and those with whom he dealt in regard to the cattle, he is to be deemed the lawful owner, as the contract showing his special or conditional title was not properly recorded. Section 2507, Rev. Code Mo., seems to be the only express provision of the law of that state upon this subject. It declares that "in all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same, whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer, or deliverer of the same, until such sum, or the value of such property, or any part thereof, shall have been paid, such condition—in regard to the title so remaining until such payment—shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged, and recorded as provided in cases of mortgages of personal property."

I do not find that this statute, as far as it is applicable to the facts of this case, has ever been construed by the supreme court of Missouri.

The claim on the part of defendant is that Cox is a *bona fide* purchaser of the cattle, because Moad was in possession, and there was no contract or instrument of record showing that his title was conditional; but the supreme court of Missouri, in *Aubuchon v. Bender*, 44 Mo. 560, in construing the laws of that state in regard to the rec-

ord of deeds and contracts pertaining to real estate, held that a purchaser who had parted with nothing, but had merely taken a conveyance of real estate in payment of an old debt, was not a *bona fide* purchaser:

"At common law there was no obligation to put upon record a conveyance affecting the title of land; but the duty of registration is now imposed upon the grantee, or the person to whom, or for whose use, the conveyance or covenant is made, and, as in all other cases where a duty is imposed, he who neglects it should suffer the consequences. The object of the requirement is to compel an exhibit of title to facilitate transfers, but principally to guard purchasers against imposition; and hence, if the prior deed is not recorded, a subsequent buyer for good consideration, without notice, will be protected. This protection, always thrown around an innocent purchaser, and to which our statute also expressly entitles him, is founded on the broadest equity. He receives it, not because the prior deed is invalid in itself,—the duty of recording it is not enforced by any such penalty,—but because justice will not suffer a person who omits a plain duty to set up a claim against one who had been led by that omission to invest his money in what he supposed his vendor had a right to sell; but, to entitle him to such protection, he must have parted with something of value, otherwise he is not injured; and such is the spirit, if not the letter, of the statute, and such has been its uniform interpretation."

In the light of this decision, and of many more of the same purport by the federal and the state courts, I am of opinion that the provisions of section 2507 which protect *bona fide* purchasers and creditors who deal with an apparent owner in possession of personal property, only apply to and protect a purchaser who pays a present consideration, or a creditor who trusts or gives credit to such person while in possession. Neither Mr. Cox nor the bank paid any present consideration, nor gave Moad any credit upon the faith of his being the owner of these cattle. On the contrary, there is much in the record to justify the conclusion that Mr. Cox knew that Moad was not the owner of these cattle. The fact that, after he had obtained from Moad the chattel mortgage of February 27th on these cattle, he did not put this mortgage upon record, is to my mind a very suggestive circumstance in support of the view that he relied wholly upon the advantage or hold he had upon Moad by reason of Moad's having sold the steers covered by his former mortgages; and the dealings between Cox and Moad in regard to these cattle satisfy me that Moad was governed by his fears of a prosecution, rather than by any sense of obligation.

I think, too, there can be no doubt that Plumb, to whom Moad delivered the cattle as agent of Cox, knew that Moad was fraudulently and surreptitiously removing the cattle. It is true, he did not say it in so many words; but there was that in his manner of testifying which would justify a jury in inferring much more from what he did not say than from what he said. He was on the watch for the cattle when Moad drove them into Breckinridge; bought 56 head of them without weighing, and in such haste as to be of itself a badge of fraud; and his testimony, as to his unscrupulous practices in starving the

cattle for water, and then allowing them to drink heavily just before they were to be weighed, stamps the character of the man. There can be no doubt of Moad's fraudulent knowledge and fraudulent participation in the transaction. He kept the cattle 19 days beyond the term of his contract, pretending that he preferred to so keep them rather than to have them sold at the then current price, and in the mean time resorted to expedients to get Tunnyhill, the plaintiff's employe who was at the farm, to leave there; and finally, when he did leave, on the 18th, for a two-days absence at Kansas City, he made hot haste to get the cattle shipped before Tunnyhill's return. He knew he had no right to sell them, and the inference is conclusive from the circumstances that he dared not move them while Tunnyhill was at the farm; and yet Moad was made the agent of Mr. Cox and the bank to ship the cattle for them. Acting through agents like Moad and Plumb, and having paid no present consideration, nor parted with a dollar or dollar's worth of value for these cattle, Mr. Cox cannot be deemed a *bona fide* purchaser or creditor for value.

I do not think the case comes within, or is affected by, the laws of Missouri in relation to recording chattel mortgages or conditional titles to personal property, as those statutes were only intended to protect those who deal in good faith with a person in possession of such property as the apparent owner.

The issue is found for the plaintiff.

In re BATES.

(*District Court, S. D. New York. April 30, 1886.*)

1. BANKRUPTCY—VACATING DISCHARGE—KNOWLEDGE OF FACTS—PETITION BY EXECUTORS.

A discharge in bankruptcy not being voidable for causes previously known to the creditor, no order to take testimony should be made upon a petition to vacate the discharge, unless the petition shows affirmatively reasonable cause to believe that the creditor was ignorant of the ground specified when the discharge was granted. The knowledge referred to in the statute is the knowledge of the creditor, not of his executors.

2. SAME—SPECIFICATIONS ALLOWED.

Specifications in this case allowed as to matters alleged to have occurred within a few days of the discharge; disallowed as respects other charges pending a long time previous.

Petition to Annul Discharge.

T. C. Cronin, for creditors.

W. B. Harison, for bankrupt.

BROWN, J. The bankrupt having obtained his discharge in this court by order granted on the twentieth of September, 1884, after

proceedings had been pending nearly six years, the petitioners, as executors of Alonzo Flack, file a petition, under section 5120 of the Revised Statutes, to annul the discharge, setting forth various specifications as grounds therefor. Flack was named in the bankrupt's schedule as a creditor, but he did not prove his debt, and died in March, 1885, some six months after the bankrupt's discharge. The petitioners, having qualified as executors, in their petition sworn to on the twenty-second day of December, 1885, after setting forth the grounds for avoiding the discharge, state that "they had not, nor had the said Alonzo Flack, to the best knowledge and belief of your petitioners, any knowledge of the matters and facts stated in the petition as the grounds of the application until after the discharge of the bankrupt was granted, to-wit, within a few days prior to the date hereof."

Such a discharge cannot be vacated unless the court is satisfied that the creditor, or his representatives, had no knowledge of the objections at the time the discharge was granted. No order of reference should, therefore, be made, unless it appears upon the petition that at least there was reasonable cause to believe that the creditor was ignorant of the grounds raised for avoiding the discharge. It would be unjust to initiate an expensive and harassing proceeding unless the petition presented a reasonable *prima facie* case in respect to the creditor's ignorance as well as in other particulars.

In this case the creditor did not prove his debt, and is now dead. The fact that his representatives had no knowledge of the grounds now raised is immaterial. The only question is whether the creditor had knowledge. The first two specifications relate to matters happening within a few days prior to the bankrupt's discharge; and there is a *prima facie* presumption, perhaps, that he was ignorant of those matters. No such presumption can be indulged in reference to the third, fourth, and fifth specifications, which are the same as were pending before the register for several years prior to the discharge. The mere averment by his executors that he had no knowledge, to the best of their belief, is not sufficient to put the bankrupt again upon trial in reference to those same matters so long pending.

The petitioners may take an order of reference to the register to take and report the evidence upon the first two specifications only. The other three are disallowed and stricken out.

UNITED STATES *v.* LEATHERBERRY.

(District Court, S. D. Mississippi. May 26, 1886.)

PUBLIC LANDS—PROTECTION OF TIMBER—BOXING TREES FOR TURPENTINE—SECTION 2461, REV. ST., CONSTRUED.

It is a violation of section 2461, Rev. St., to box and chip trees, growing on the public domain, for turpentine purposes.

Motion to Exclude Evidence.

J. B. Harris, U. S. Atty., for the United States.

Luke Lea, for defendant.

HILL, J. It is admitted in this case that the trees were not severed or felled, and that the only cutting was what is known as boxing and chipping the trees, in order to extract the gum or sap, for turpentine or resin. The counsel for the defendant moves the court to exclude the evidence of the plaintiff, as it does not make out an offense against the law. I am, however, of the opinion that the motion must be overruled. The object and purpose of the statute (section 2461) is to protect the public timber. This purpose would, in a great measure, be defeated should the view of defendant's counsel prevail. The language of the statute is, "*cut, or procure to be cut, or aid or assist or be employed in cutting,*" etc., "*with intent to export, dispose of, use, or employ the same in any manner whatsoever other than for the use of the navy of the United States.*" Certainly cutting the timber in order to extract its gum and sap for one's private use is cutting it with intent to use and employ it in a manner other than for the navy of the United States.

Motion overruled.

In re Wolf and another.

(District Court, W. D. Arkansas. May Term, 1886.)

1. CRIMINAL LAW—WARRANT FOR REMOVAL—TRIAL, WHERE HAD.

The judge of a United States court, when acting on an application for a warrant for the removal of a person charged with crime, from one district to another for trial, is to exercise a sound judicial discretion. He must look to the question of the jurisdiction of the court sitting where he is asked to remove the prisoner, to try the case. To determine where the trial is to be had, he may look into the whole case to see that the court where the party is to be removed has jurisdiction over the place, the person, and the subject-matter.

2. SAME—WANT OF JURISDICTION.

There may be a want of subject-matter, either because there is no law making the act charged a crime, or because the act is not properly charged, or that the party charged has not done the act.

3. SAME—INDICTMENT.

If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to

take the same as a *prima facie* showing that a crime has been committed by the party charged, at the place alleged, and, if nothing else appears, to order a removal of the party charged.

4. **SAME—CONSTRUCTION OF STATUTES IN RESTRAINT OF LIBERTY.**

This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed and strictly pursued.

5. **COURTS—SUPREME COURT OF DISTRICT OF COLUMBIA.**

The supreme court of the District of Columbia has jurisdiction of an offense committed by one Indian upon another Indian.

6. **INDIANS—CRIMES—JURISDICTION.**

The prohibition against the jurisdiction of the courts of the United States to try an Indian for an offense committed on another Indian applies only when the offense is committed in the Indian country. When the Indian commits a crime outside the Indian country, (although that crime may be on another Indian,) he is, like any other person, amenable to the criminal laws of the place where the crime is committed.

7. **CONSPIRACY—REV. ST. § 5440.**

Conspiracy, as defined by section 5440, Rev. St., means an unlawful agreement to do some act which by some law of the United States has been made a crime. This is what is meant by agreeing to commit an offense against the United States.

8. **SAME—OFFENSE IN DISTRICT OF COLUMBIA.**

The laws of Maryland in force on the twenty-seventh of February, 1801, are laws applicable to the District of Columbia in all cases where they have not been changed by act of congress, or in all cases where an act of congress does not apply to the subject-matter.

9. **FALSE PRETENSES—CRIME IN DISTRICT OF COLUMBIA.**

False pretenses is a crime in the District of Columbia, both by the law of Maryland applicable to the District, and by an express statute of the District.

10. **CONSPIRACY—OFFENSE AGAINST LAWS OF UNITED STATES.**

Any conspiracy to obtain money by false pretenses in the District of Columbia is a conspiracy to commit an offense against the United States.

The petitioners in this case were, on April 9, 1886, at a term of the supreme court for the District of Columbia, indicted, together with William A. Phillips, for violation of section 2105 of the Revised Statutes; that is, for making a contract with Indians in violation of the law of the United States. Subsequently, on April 21, 1886, they, together with William A. Phillips, were indicted in said court for a conspiracy to commit an offense against the United States. Upon the first-named indictment a warrant was issued by Stephen Wheeler, a commissioner of the United States district and circuit court for the Western district of Arkansas, for the arrest of Wolf and Ross, who were in said district, that, as provided by section 1014 of the Revised Statutes, they might, by the order of the judge of said court, be removed to the place of the sitting of the supreme court of the District of Columbia for trial. They were arrested on the warrant of the commissioner, and, while in the custody of the marshal of the United States for the district, they presented to the judge of the court a petition for a writ of *habeas corpus*, praying for a discharge from arrest because they are citizens of the Cherokee Nation; members of said tribe or nation of Indians by blood; and that in and about the things

and matters set up in the indictment to have been done by them they were officers of the Cherokee Nation, and in and about said matters they were acting in their official capacity under the laws of the Cherokee Nation, and represented her in and about the transaction alleged against them in the indictment; that they are amenable only to the courts and laws of the Cherokee Nation; that the supreme court of the District of Columbia, in which said indictment was found, and to which it is sought to remove them, has no jurisdiction to try them for the alleged offense; that the aforesaid indictment charges no offense; that it is void for uncertainty, and otherwise insufficient to give the aforesaid court of the District of Columbia jurisdiction over the persons of the petitioners; that the said court has no jurisdiction of the subject-matter, or of the persons of the petitioners. Wherefore they say they are unlawfully held and restrained of their liberty by the marshal, contrary to the constitution and laws of the United States. They pray they may be discharged. The government, by its attorney, moved for a warrant of removal of Wolf and Ross to the District of Columbia, that they might be tried on the indictment. Subsequently the indictment for conspiracy was presented to the court.

William H. H. Clayton, for petitioners.

E. C. Boudinot, for the United States.

PARKER, J. The question in this proceeding is, should these parties, Wolf and Ross, be removed to the District of Columbia for trial on either one of these indictments? If, under the law, they should, they are not entitled to be discharged on *habeas corpus*. If they should not be so removed, they are entitled to a discharge, either by *habeas corpus* or without it.

Under the law of the United States, (section 1014, Rev. St.,) "where any offender is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This court held in the case of *U. S. v. Rogers*, 23 Fed. Rep. 658, that the judge, in acting on an application for the removal of a party charged with crime, was performing a judicial function; and in the performance of such function he may look into the proceedings of the commissioner, or the court in which the indictment was found, for the purpose of enabling him to properly determine questions pertaining to the removal, and grant or refuse the order accordingly. Under the section of the statute above referred to the judge is invested with plenary power to grant or refuse the warrant of removal, and he is but exercising sound judicial discretion when he looks into the question of jurisdiction, or into the whole case, so far as to enable him to determine where the trial is to be had. If the indictment contains

allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as a *prima facie* showing that a crime has been committed at the place alleged by the party charged; and, if nothing else appears, to order a removal of the party charged. But I have no doubt the judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed, and strictly pursued. The government asking a removal is required to fully comply with the law.

The question, then, which presents itself to the judge is, where the case is to be tried, where a trial can be had. Before a trial can be had before any court of the United States, such court must have jurisdiction over the place, the person, and the subject-matter. If there is an absence of subject-matter, the trial cannot be had. There may be an absence of subject-matter, either because there is no law declaring the act charged a crime; or because, as charged, the act is not a crime; or because the facts fail to show that the party sought to be removed committed the act charged. I shall confine myself to the indictment charging a conspiracy, because if this shows a crime committed by persons over which, and at a place where, the supreme court of the District of Columbia has jurisdiction, it would be my duty to order a removal of the petitioners to that court for trial.

The indictment in this case alleges this crime was committed in the District of Columbia. There is no question of the jurisdiction of the court in which the indictment was found extending over the place where the crime is alleged to have been committed.

Then, the next question is, does the supreme court of the District of Columbia have jurisdiction over the persons of petitioners? The petitioners, Wolf and Ross, are shown to be Indians by blood, members of the Cherokee Nation or tribe of Indians because of their having the blood of the race. They reside in and are a part of the Cherokee Nation or tribe of Indians. This crime is one alleged to have been committed against the Cherokee Nation of Indians, which in law is an Indian tribe. This, then, is a case of a crime committed by one Indian against another Indian. It is claimed, this being true, the case is not within the jurisdiction of the supreme court of the District of Columbia; that said court has no jurisdiction over the persons of defendants. Section 2145, Rev. St., provides that, "except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." Section 2146, among other things, provides that the preceding section shall not be construed to

extend to crimes committed by one Indian against the person or property of another Indian. * * *

The prohibition by this section of the law of the jurisdiction of a court of the United States over a crime committed by one Indian upon another is one which is personal to the Indian, only when the crime is committed in a certain section of the country, to-wit, the Indian country. It is a prohibition which is clearly local. When a crime is committed by an Indian, although such crime may be against the person or property of another Indian, if committed outside the Indian country, the Indian is like any other person as far as the criminal laws of the nation or the states are concerned. In a case where he has committed a crime against such laws, he is by them a forensic citizen, subject to the jurisdiction of the courts which administer them. Our laws govern all. They bind and protect all. They bind and protect alike all persons,—natives, foreigners, and those whose *status* to the United States may be one of alienage. They are all alike subject to the criminal laws of the country, and when they commit a crime against the laws of the nation, at a place over which the courts of the nation have jurisdiction, they are subject to trial in such courts. Mr. Kent, in 1 Kent, Comm. 36, says: "Strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law."

To the above rule there are some exceptions: *First*, the case of a foreign sovereign and his attendants; *second*, foreign ambassadors, and their attendants. By the law of nations they are not subject to the laws of a country they may visit, or in which they may have a temporary domicile. Sections 124-134, Bish. Crim. Law.

The other exception is one recognized as existing under the laws of the United States. It is that of an Indian committing a crime upon another Indian, *in the Indian country*. When an Indian is outside of that country he is entitled to the full measure of protection afforded by the laws of the nation, and if he commits a crime outside of the Indian country, whether upon one of his own race or another, he is amenable to the law of the place where the crime is committed. This proposition, to my mind, is established when stated.

This, then, disposes of the proposition as to the jurisdiction of the court in which the indictment was found over the persons of petitioners.

The next question is, did said court have jurisdiction over the subject-matter? This involves the query as to whether there is any subject-matter; that is, whether the act charged to have been done by them is made a crime by the laws of the United States; then, whether such crime is properly charged. The crime charged to have been committed by the petitioners is conspiracy to commit a crime against the United States, which, by section 5440, Rev. St., is defined to be a crime. By the common law a conspiracy is an agreement be-

tween two or more persons to do some unlawful act, or to do a lawful act in an unlawful manner. The agreement itself constitutes the offense, whether an act is done in furtherance of the object or not.

Section 5440, Rev. St., is as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty. * * *

It is manifest that to constitute a criminal offense under this section the object of the conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the laws of the United States, or to defraud the United States; and that something must be done by one or more of the conspirators to effect the object of the conspiracy. The definition of this offense would be "an agreement between two or more persons to do some act which, by the laws of the United States, is a crime, and the doing of some act, by one or more of those who had so agreed, in furtherance of or to effect the object of the agreement." To constitute a good indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with such reasonable certainty the acts intended to be effected or carried out by the agreement of the parties so that it can be seen the object of the conspiracy was a crime against the United States. The conspiracy or agreement, and the doing of some act in furtherance of it, make up the offense. The object of it, however, is a requisite of the indictment.

To my mind, this indictment charges an agreement between Ross, Wolf, and Phillips, and other parties unknown, to obtain from the Cherokee Nation, by false pretenses, the sum of \$22,500. It charges the unlawful agreement to cheat and defraud the Cherokee Nation of the sum of \$22,500. It charges the means to be used by them in cheating and defrauding the Cherokee Nation. It charges they did an act in furtherance of the unlawful agreement, or to effect the object of the conspiracy, to-wit, the said Wolf and Ross received from Dennis W. Bushyhead, who was then chief of the Cherokee Nation, a large sum of money, to-wit, the sum of \$22,387.50 in lawful money of the United States. The means set out in the indictment as being the method adopted by the unlawful agreement to consummate it, show the purpose to have been to commit the crime of obtaining money by false pretenses. Now, is this a crime against the United States, when committed in the District of Columbia?

Congress has power, by virtue of article 1, § 8, of the constitution, to exercise exclusive legislation over the District of Columbia. Congress, by the act of the twenty-first of February, 1871, which is now embodied in section 93 of the Revised Statutes for the District of Columbia, has provided that "all laws of the United States which are

not locally inapplicable shall have the same force and effect within the District as elsewhere in the United States." This statute makes section 5440, relating to the crime of conspiracy, applicable to the District of Columbia. Now, a conspiracy to do any act which has been declared a crime by any law of the United States, although such law may be applicable to the District of Columbia alone, would be a conspiracy to commit an offense against the United States, as violations of the criminal laws relating to the District of Columbia are offenses against the United States. Such laws are as much laws of the United States as though their application was to the whole country. A conspiracy to commit any act which by any law of the United States is a crime is a conspiracy to commit an offense against the United States.

Is there any law in the District of Columbia which makes it an offense to obtain money by false pretenses? By the act of congress of February 27, 1801, "the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district which was ceded by that state to the United States, and by them accepted." Section 92, Rev. St., relating to the District of Columbia, provides "that the laws of the state of Maryland not inconsistent with this title, as the same existed on the twenty-seventh of February, 1801, except as since modified or repealed by congress, or by authority thereof, or until so modified or repealed, continue in force within the District." These provisions of law carry the laws of Maryland as they existed February 27, 1801, to the District of Columbia, and make them as applicable to such District as though such laws had been expressly enacted by congress. What is now called the crime of "false pretenses" was not indictable at common law, unless the false pretense consisted of a false token which would impose on the public generally,—such as getting property by means of a worthless bank-bill, or cheating by means of false weights or measures, such as the gallon, the yard, or a false seal affixed to cloth in order to enhance the price. The cheating which was indictable at common law as a false pretense was one effected by some illegal and deceitful practice or token which affects, or may affect, the public. The English statute of 30 Geo. II. c. 24, passed in 1757, was the first time the English law took notice of these private frauds known by the name of "false pretenses." This statute provided "that all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders. * * *" This statute was held to have created an offense which did not exist before. It was considered by the English courts to extend to every case where a party had obtained money or property by falsely representing himself to be in a situation in which he was not, or any occurrence which has not happened, to which persons of ordinary caution

might give credit. This English statute of Geo. II., by the constitution of Maryland, adopted in the year 1776, was carried to the state of Maryland, and made as much a part of the law as though her assembly had expressly enacted it; as by such constitution "all English statutes then in force in England or Great Britain, which have been introduced, used and practiced by the courts of law or equity" of Maryland, were adopted as the law of Maryland. 1 Charters & Const. 829. This statute of Geo. II. was in force in 1776. It was introduced, used, and practiced in the state of Maryland. It was the law of Maryland on the subject of false pretenses on the twenty-seventh of February, 1801. By the act of congress of that date it was carried to the District of Columbia. For these reasons, I think it clear that getting money by false pretenses, when the act is done in the District of Columbia, is an offense against the United States. But it is hardly necessary to go to the law of Maryland to ascertain whether false pretenses is a crime, when the law of the United States, as applicable to the District of Columbia, in section 1162, Rev. St., relating to the District, provides that every person convicted of obtaining by false pretenses any goods or chattels, money, bank-note, promissory note, or any other instrument in writing, for the payment of money or other valuable thing, etc., "shall be punished," etc. There may be some question as to where we are to look for a definition of the crime prescribed by this act. But there can be no question as to where we can find a definition of the crime under the English statute, carried to the District of Columbia by a rather circuitous, yet effective, process. We find it in the interpretation of the same by the English courts.

To constitute the offense of false pretenses it must appear (1) that there was an intent to defraud; (2) that an actual fraud was committed; (3) that the false pretense was made for the purpose of perpetrating the fraud; (4) that it was accomplished by these means. This is the crime against the United States which the petitioners are charged with conspiring to commit. While they are not charged with committing this crime, but only conspiring to commit it, the indictment must set out enough to enable us to see that the act they have conspired to commit is a crime against the United States. I think the indictment does this. It sets out the fraudulent agreement; the fraudulent design; the false and fraudulent means which were to be resorted to that the fraudulent end might be accomplished; and the doing of an overt act in furtherance of the unlawful design.

The indictment, in my judgment, under the law, is sufficient to show jurisdiction of place and person, the existence of, and jurisdiction over, the subject-matter by the supreme court of the District of Columbia. It is claimed in argument that the allegation of falsity, as set out in the indictment in regard to the statements made by Ross, Wolf, and Phillips to the Cherokee Nation,—that the appropriation of

\$300,000 to said nation, by the act of congress, of the third of March, 1883, was made as an additional payment to it for lands which it had already sold to the Pawnees, Poncas, Nez Perces, Otoes, and Missouries, and Osages,—is not true; as a matter of fact, such appropriation was made as an additional payment upon lands so sold, and if such representations were made by Ross, Wolf, and Phillips, instead of their being false, they were true. Whether these representations, if made, were true or false, is hardly material, as there are several other means set out in the indictment by which the conspiracy was to be accomplished, any one of which would be sufficient to indicate the method of consummating the purpose of the conspiracy, all of which means are alleged to be false and fraudulent. I am of the opinion that the position of petitioners' counsel on this question is correct. The Cherokee Nation agreed with the United States, by the sixteenth article of the treaty of 1866, that the United States might settle friendly Indians on its lands west of ninety-sixth degree. It further agreed that it would sell to such friendly Indians as the United States might settle on their lands such amount of land as was necessary to give each member of said tribe so settled 160 acres; said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the president; and if they should not agree, then the price to be fixed by the president; the Cherokee Nation to retain the right of possession of, and jurisdiction over, all of said country west of ninety-sixth degree of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever. This provision of the treaty is clearly an agreement to sell to friendly Indians, who the Cherokees agree with the United States may be settled on the land. The Cherokees have sold portions of their land to the Pawnees, Poncas, Nez Perces, Otoes, and Missouries, and Osages. An agreement was entered into to sell to the Cheyennes and Arrapahoes which was never consummated, as they never went on the land and occupied the same. They have no just claim to it, and it still belongs to the Cherokees. The Cherokees have never parted with any other of their lands west of the ninety-sixth degree.

It could hardly be presumed that the government was paying for lands in advance of a sale, or even an agreement to sell. The Cherokees agreed to sell to friendly Indians, the same to be their property only when sold to them and occupied by them. But it is said that all the lands of the Cherokees west of ninety-sixth degree, not sold to friendly Indians, were appraised by the president under the act of congress of May 29, 1872. It is true that section 5 of that act provided:

The "president and secretary of the interior are hereby authorized to make an appraisement of the Cherokee lands lying west of the ninety-sixth degree of west longitude, and west of the lands of the Osage Indians, in the Indian

territory, and south of the southern line of the state of Kansas, ceded to the United States by the Cherokee Indians under their treaty of July 19, 1866, for the settlement of friendly Indians, and report the same to congress."

Now, they by the treaty of 1866, ceded no lands to the United States west of the ninety-sixth degree. They only consented the United States might settle friendly Indians on the land west of the ninety-sixth degree, and agreed to cede, not to the United States, but to the friendly Indians when they went on the land. Under this law the president had no right to appraise any land except what had been sold to the friendly Indians by the Cherokees. The appraisement by him of any other lands took away no rights from the Cherokees, and gave none to the United States. From the proof before me, the Cherokees never understood this payment to them of \$300,000 to be a payment on their unsold and unoccupied lands; but they always claimed the price proposed to be paid to them for the occupied lands was inadequate,—less than in justice and equity they were worth; and through their agents, from the time of the sale of the same, they were pressing their claim for the payment of their true value.

The executive department of the government did not understand this \$300,000 payment to be a payment on other than the lands already sold and occupied, as evidenced by the letter of the Hon. H. M. Teller, secretary of the interior, of January 31, 1883, in which he says:

"In my opinion the appropriation of \$300,000 proposed by the amendment is not an unreasonable one, as the sums already paid to the Cherokee Nation, with this proposed appropriation added, are not believed to be in excess of the value of the land upon which friendly Indians have already been located."

This court held in *U. S. v. Rogers*, 23 Fed. Rep. 659, that the Cherokee Indians hold what is called the "Cherokee Outlet" by substantially the same kind of title it holds its other lands. The title to all its lands was obtained by grant from the United States. This title is a base, qualified, or determinable fee, without the right of reversion, but only the possibility of reversion in the United States. This, in effect, puts all the estate in the Cherokee Nation. *U. S. v. Reese*, 5 Dill. 405. This principle puts the title fully and completely in the Cherokee Nation, and, until it agrees to part with the same, it cannot be taken from it. It has not yet agreed to part with these lands except for a specific purpose. It does seem to me there need be but little trouble on the question of the title of the Cherokees to their lands, if we but look at this title, and understand its true nature, and are prompted by a sense of duty to do equal and exact justice to the Indians, and to give them that full measure of justice which by law and good conscience belongs to them.

These petitioners will be required to give bond in the sum of \$2,000 for their appearance before the supreme court of the District of Columbia for trial, or, in case of failure to give such bond, the warrant of removal will be issued to be executed by the marshal.

KELLY v. UNITED STATES.¹

(Circuit Court, D. Maine. July 7, 1885.)

1. CRIMINAL LAW—AMENDMENT OF RECORD.

The circuit court may amend its record, in a criminal cause, after remission to the district court, under Rev. St. § 1037.

2. SAME—FORMER JEOPARDY.

The discharge of a jury who have disagreed, constitutes no bar to a further prosecution.

3. EVIDENCE—MEDICAL EXPERT.

It is not necessary to show experience in special cases in order to qualify a surgeon to testify as an expert.

4. SAME—DYING DECLARATION, WHEN ADMISSIBLE.

It is essential to the admissibility of a dying declaration that it was made under a sense of impending death, and this preliminary fact must be proved by the party offering the declaration in evidence.²

5. COURTS—JURISDICTION.

Offenses committed upon lands purchased by the United States for the erection of forts, with the consent of the legislature of a state, and of which jurisdiction has been ceded to the United States, are within the jurisdiction of the federal courts.

Indictment for Manslaughter.

Dennis Kelly, orderly sergeant, in charge of Fort Popham, was indicted for manslaughter within said fort. He was put upon trial before the circuit court, September term, 1884; the circuit and district judges presiding. The jury reported, through their foreman, that they were and would be unable to agree, and thereupon, by order of the court, were discharged from further consideration of the case. The indictment was certified to the district court for the December term following. The record in the circuit court had not been extended, and the order of court discharging the jury, by inadvertence, had not been minuted upon the docket. In the district court the grand jury presented a new indictment, and a *nolle prosequi* was entered on the indictment which had been certified from the circuit court. To the new indictment Kelly's counsel began to read a plea of former jeopardy; and, while reciting the record of the circuit court as it rested in docket entries, the judge suspended the reading, passed into the circuit court, which was then standing open, directed the correction of the record to show the fact as to the discharge of the jury, and ordered a corresponding correction of the certificate to the district court. Proceedings were then resumed in the district court. A new plea of former jeopardy was presented, reciting the amended record of the circuit court, which was overruled; and, the defendant standing mute, a plea of not guilty was ordered to be entered. Upon the trial other points arose which sufficiently appear in the opinion. After a verdict of guilty and sentence, a writ of error and *superseas* of sentence were allowed by the circuit judge.

¹ Reported by A. H. Davis, Clerk U. S. Circuit Court, D. Maine.

² See note at end of case.

H. D. Hadlock, for plaintiff in error.

W. F. Lunt, Dist. Atty., for the United States.

COLT, J. In this case a writ of error was allowed from the judgment of the district court, under the act of March 3, 1879. 20 St. 354. The errors assigned are numerous. We will only consider those which seem to us important.

The second, third, and fourth assignments of errors raise the question of former jeopardy. Kelly was first tried in the circuit court at the September term, 1884, on an indictment for manslaughter. The jury failed to agree, and therefore the case was certified to the district court under section 1037, Rev. St. The order of remission set out that the jury were unable to agree, but did not state that they were thereupon discharged by the court. After the case had been remitted to the district court, the district judge, while sitting in circuit court, ordered the clerk of the circuit court to correct the record so as to conform to the fact, by inserting, after the words "unable to agree," "and were, by order of court, discharged from further consideration of this case." The plaintiff in error contends that his plea of former jeopardy should have been sustained, on the ground that the court had no right to correct the record in the manner stated; and that without such correction the plea of former jeopardy would be good; because, as the record then stood, it did not appear that the jury had been discharged. The district judge sat at the trial of the case in the circuit court. The fact was one within his knowledge, and the knowledge of all present. The omission was a mere clerical one. Under the circumstances we can discover no error in the order to correct the record in accordance with the fact. The power of a court to amend its own record *nunc pro tunc* has long been recognized, and is well established. *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708; *Jones v. Lewis*, 8 Ired. 70.

The second plea of former jeopardy, raised by the fifth assignment of error, presents a more serious question. To the indictment found in the circuit court a *nolle prosequi* was entered in the district court, and a new indictment found in the district court, upon which Kelly was tried and convicted. Under these circumstances, does the trial and discharge of the jury, without the consent of the prisoner, in the circuit court, constitute a former jeopardy, and so bar further proceedings in the district court upon a new indictment? This precise point, we believe, has not arisen before. It is well settled, however, in the federal courts and in most of the state courts that the discharge of the jury by the court, where they are unable to agree, without the consent of the accused, is no bar to any future trial for the same offense. Bish. Crim. Law, § 1033; *U. S. v. Perez*, 9 Wheat. 579. Here the jeopardy is considered apparent, not real, and the case falls within the class which is thus defined by Bishop in section 1030:

"But there are other defects, equally fatal,—defects inherent in the case, though not properly of record,—defects existing in the nature of things, and therefore certain, yet unknown, or even of a nature not to be known, until the evolutions of events bring them to light. And if one of these other defects is found to have lain hidden in the cause when it has opened to the jury, the proceeding, however far it formally progresses, will not bar future proceedings, because it produces in law no jeopardy to the defendant."

The supreme court in *U. S. v. Perez*, in deciding the question whether the discharge of the jury by the court is a bar to a future trial, say:

"After weighing the question with due deliberation, we are of the opinion that such a discharge constitutes no bar to future proceedings, and gives no rights of exemption to the prisoner from being again put upon trial."

If a trial, followed by a discharge of the jury, does not constitute a legal jeopardy so as to bar further proceedings, then it is difficult to see how there was any jeopardy in this case by reason of the proceedings in the circuit court under the first indictment. The counsel for the plaintiff in error has filed a very learned and elaborate brief on the subject of what constitutes jeopardy; but, in our opinion, the question narrows itself down to this: whether a former trial and discharge of the jury can be pleaded as a former jeopardy; and if it cannot, then the plaintiff in error in this case cannot set up this bar, and it follows that, as no former jeopardy exists, the prosecution had a right to enter a *nolle prosequi* on the first indictment, and bring another, just the same as if no trial had taken place. The legal necessity for discharging the jury is largely in the discretion of the court. We think it sufficient if the record, as in this case, shows that the jury, being unable to agree, were by order of the court discharged, without setting out specifically the circumstances upon which the order of discharge was based.

The objection is raised to the admissibility of the expert testimony of Dr. Edwin M. Fuller in the sixth, seventh, eighth, and ninth assignments of errors. Dr. Fuller testifies that he was a physician and surgeon, a graduate of Bowdoin Medical College in 1873, and that since graduation he had been in practice at Bath, Maine. We think Dr. Fuller, by reason of his general professional studies and experience, was a qualified expert, without showing any special study or experience on his part of gunshot wounds. Whart. Crim. Law, § 48. Experts in science are permitted to give conclusions drawn as scientific results from any particular *data*, and the questions put to Dr. Fuller relative to the elevation in which the pistol must have been held in order to inflict the wound seem to come clearly within this rule. Whart. Crim. Law, § 821g; *Com. v. Lenox*, 3 Brewst. 249.

The assignments of errors from the tenth to the eighteenth, inclusive, relate to the question of the admissibility of the dying declaration of Smith. It is essential to the admissibility of a dying declaration that it was made under a sense of impending death, and this preliminary fact must be proved by the party offering the declara-

tion in evidence. The evidence upon which the paper was admitted was this: The deceased stated, at or about the time the statement was taken down in writing: "It is of no use, I am almost gone;" or, "Oh, dear! have I got to talk? I am almost gone." Dr. Furgerson testified that the morning Smith was shot, and when he was lying on the veranda of Mrs. Haley's house, he said to Mr. Perkins: "I think he cannot live;" and that, in saying those words, Smith opened his eyes and looked up at him, evidently understanding what was said. The fact that Dr. Furgerson's testimony was given in rebuttal cannot be material, assuming the objection on that ground to be well taken, which is by no means clear, in view of the rule that the order in which the evidence is introduced is largely within the discretion of the court, and that no exception lies on that ground. *Com. v. Brown*, 130 Mass. 279. It seems to us that the evidence brings the statement of Smith within the rule as to dying declarations, and that it was properly admissible as such.

The respondent's motion to dismiss on the ground that the government had failed to show that the shooting occurred upon land owned by the United States, over which jurisdiction had been ceded by the state of Maine, was denied by the court, and this forms the subject-matter of the twenty-third assignment of error. It is admitted by counsel that Fort Popham, where the shooting took place, stands upon land embraced in the deed from Joshua Shaw to the United States, dated June 21, 1808, and it is clear that the Shaw deed, and the deed from Clark to the United States, dated June 1, 1863, include all the land covered by the fort. The only question is whether the consent of the legislature of the state of Maine has ever been obtained.

By the act of the legislature of Maine of April 17, 1857, jurisdiction was ceded to the United States "over any tract or tracts of land at or near the entrance to Kennebec river, Maine, that may be acquired by the United States for the purpose of carrying out an act of congress of March 3, 1857, providing for the 'erection of fortifications at the mouth of the Kennebec river, Maine,' by building and maintaining thereon forts, magazines, arsenals, dock-yards, and other structures, with their appendages, and over all the contiguous shores, flats, and waters within four hundred yards from low-water mark; and all right, title, and claim which this state may have to or in the said * * * tract or tracts at or near the entrance to Kennebec river, are hereby granted to the United States."

By the act of the ninth January, 1862, it was enacted by the legislature of Maine "that the United States may hold forever, for the erection and maintaining of a fort thereupon, certain territory situated at Hunnewell's point, at the mouth of the Kennebec river in the town of Phippsburg within the county of Sagadahoc, included within the following boundaries, * * * and containing five and a quarter acres, with all the buildings, structures, and improvements of ev-

ery kind situated thereon, reserving such jurisdiction as the state has in other places within same, ceded to or held by the United States for similar purposes."

On February 18, 1871, the legislature of Maine passed the following act:

"Section 1. That the consent of the legislature of the state of Maine be, and the same is hereby, given to the purchase by the government of the United States, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of the state, for the purpose of erecting thereon light-houses, and other needful public buildings whatever," etc.

In view of the foregoing acts, we can come to no other conclusion than that the legislature of the state of Maine intended to give its consent to the purchase by the government of the United States of the land on which Fort Popham is situated. The supreme court of Maine declined to take jurisdiction in this case. The court held that Fort Popham is a United States fort, and that the purchase was made by consent of the legislature of the state. *State v. Kelly*, 76 Me. 331. By the twenty-seventh assignment of errors, it is charged that the court erred in overruling the respondent's motion in arrest of judgment. The first objection urged under the motion in arrest is that the indictment does not state that the land on which the fort stands was purchased by the consent of the legislature of the state of Maine. The first count in the indictment alleges as follows:

"The site of which said fort was purchased by the said United States, and then and there held by and in the possession of the said United States for the erection of a fort, with the consent of the legislature of the state of Maine, in which said state said fort is situated, and which said fort was, at the last mentioned day, then and there a place under the sole and exclusive jurisdiction of the said United States, and within the jurisdiction of this court."

We think this averment of jurisdiction clearly sufficient. The language bears out the construction that the purchase, holding, and possession were all for the erection of a fort, and all with the consent of the legislature of Maine. It is unnecessary to consider in detail this averment in the two other counts. We think, however, the allegation in these counts is sufficient under the statute defining the offense charged. In *U. S. v. Gilbert*, 2 Sum. 19, 87, STORY, J., says:

"If the offense is so laid in the indictment as to bring the case within the language of the statute in point of jurisdiction and certainty of description, that is all which can properly be required in our country."

I have carefully examined the numerous questions raised upon the record by the learned counsel for the plaintiff in error, and have considered the more important ones, and the conclusion reached is that there is no error in the proceedings in the district court.

The judgment of the district court is affirmed; the respondent to stand at the bar of this court for sentence.

NOTE.

Dying declarations, to be admissible in evidence, must be made, not merely *in articulo mortis*, but under the sense of impending death, without expectation or hope of recovery. *People v. Abbott*, (Cal.) 4 Pac. Rep. 769. See *State v. Cantieny*, (Minn.) 24 N. W. Rep. 458.

Dying declarations, made under a belief of imminent death, and without hope of recovery, are admissible in evidence, although others thought at the time that declarant would not die, and even though death may not have followed for some time. *People v. Simpson*, (Mich.) 12 N. W. Rep. 662.

The party signing or making dying declarations must have been in such a state of mind at the time as to have had a clear understanding of the contents of the document he is said to have signed, or of the declaration he is said to have made. *Binfield v. State*, (Neb.) 19 N. W. Rep. 697.

A dying declaration is admissible in evidence, although not signed by the declarant, and although it was not given in voluntary expressions, but by assenting words to leading questions, provided the declarant was on the point of death, and knew that he was, and was too weak for the mechanical exertion of signing his name. *People v. Callaghan*, (Utah,) 6 Pac. Rep. 49.

The dying declarations must be as to facts, and not merely expressions of opinions; and their credibility is for the jury, and is to be determined from considerations in connection with all the surrounding circumstances. *State v. Clemons*, (Iowa,) 1 N. W. Rep. 546.

It was said in *People v. Wasson*, (Cal.) 4 Pac. Rep. 555, that the expression of the opinion by the declarant that the defendant was the man who shot him, was not admissible.

In *People v. Abbott*, (Cal.) 4 Pac. Rep. 769, the defendant was taken to the bedside of a wounded man, and the latter declared that he was the man who had wounded him with a knife, and the court admitted this declaration.

In *People v. Simpson*, (Mich.) 12 N. W. Rep. 662, two women were walking together, and one of them was fatally shot, and immediately after the shot was fired the injured woman exclaimed: "My God, Simpson, you have shot me!" and the court held it to be admissible in evidence.

The competency of dying declarations is restricted to those cases in which the death is the subject of the charge. *Railing v. Com.*, (Pa.) 1 Atl. Rep. 314.

An offer in evidence of dying declarations should be preceded by evidence that they were actually made in expectation of impending death; and this may be shown by the nature of the injury; by what the injured person said, or what physicians or attendants said in his hearing; by the evident state of his mind, etc. It is not essential that the injured person should have said that they were made in the expectation of death, or that any person should have said in his presence, that death must speedily follow. *People v. Simpson*, (Mich.) 12 N. W. Rep. 662.

In order to make dying declarations admissible in evidence, it is not necessary that the declarant state everything constituting the *res gestæ* of the subject of his statement, but only that his statement of any given fact be a full expression of all that he intended to say as conveying his meaning as to such fact. *State v. Patterson*, 45 Vt. 308.

In *Brown v. Com.*, 73 Pa. St. 321, where a man, bearing marks of violence, was found dead about 300 yards from his house, and his wife was found in the house, (which had the appearance of having been robbed,) with wounds of which she subsequently died, the court held that the dying declarations of the wife were not admissible in the trial of a prisoner for the murder of the husband.

A man was wounded in a fight with the defendant, and on the same day, while expecting to die, made certain statements in relation to the fight. He lived 10 days longer, and his physicians expressed the hope to him that he would recover, and he said, "I hope so too;" but at last died of the wounds. It was held by the court that evidence of his statements was admissible on trial of defendant for murder. *Swisher v. Com.*, 26 Grat. 963.

Dying declarations are admissible in evidence if the declarant had given up all hope of life, although he did not state that he was expecting to die immediately, and although the same matter had been testified to by the declarant on a preliminary examination of the accused, and that testimony had been properly given in evidence. *State v. Wilson*, 24 Kan. 189.

Dying declarations are not admissible in evidence if the declarant had the slightest hope of recovery, although he dies within an hour afterwards. *People v. Hodgdon*, 55 Cal. 72.

The admissibility of dying declarations as evidence is a blended question of law and of fact. They are not incompetent because made in answer to questions by the wife and the physician of the deceased. *State v. Trivas*, 32 La. Ann. 1086.

Dying declarations are admissible in evidence on a trial for murder, when made in view of impending death and after abandonment of all hope of recovery, as to the facts

and circumstances constituting the *res gesta* of the homicide, but not as to matters occurring anterior to and not immediately connected with it. *State v. Draper*, 65 Mo. 335.

Dying declarations, not part of the *res gesta*, are not competent in exculpation of the accused. *Moeck v. People*, 100 Ill. 242.

In *Boyle v. State*, (Ind.) 5 N. E. Rep. 203, the dying declaration of the deceased was taken in the form of questions and answers; and he was asked, "What reason, if any, had the man for shooting you?" to which he answered: "Not any that I know of. He said he would shoot my damned heart out." Held to be admissible, and not the expression of an incompetent opinion.

JENCKS v. LANGDON MILLS and others.

(Circuit Court, D. New Hampshire. May 23, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—SPECIAL LICENSE—INVENTOR IN LICENSEES' EMPLOYMENT.

The plaintiff was in the employment of the defendants; and, in experimenting upon his inventions, of which he had several, he took the time which belonged to the defendants, used their tools, workmen, and materials, and tested the inventions in the machinery which was run by them. He was given to understand in regard to inventions he brought out prior to the one in question that the defendants claimed the right to use his inventions because he was in their employ. About the time of patenting the invention in question he received a sum of \$250 a year in addition to his salary from the defendants, and he now claimed that this sum was given as a royalty for the use of his patent for spindle bolsters; but it appeared from the evidence that he had made, about this time, a complaint of being unfairly treated, and his receipts showed that the \$250 had been received by him as an increase of salary. There was also evidence that he was anxious for the defendants to adopt his first invention, as it would be an advantage to him in introducing it elsewhere, and agreed to allow them to use it free, and that this agreement was extended to his other subsequent inventions, including the one in question. Held, in an action for infringement, that the defendants had shown a special license for the use of the patented spindle bolster and other improvements, put into their mills while in their employ.

In Equity.

Wood & Clark, for complainant.

Livermore & Fisk, for defendants.

COLT, J. This bill in equity is brought for infringement of letters patent No. 168,644, granted the complainant for improvement in spindle bolsters. The suit is between citizens of New Hampshire, and the first question to be determined is whether there is a subsisting license between the plaintiff and the defendant corporation covering the patented bolsters in controversy.

The plaintiff was in the employ of the defendant corporation as overseer or superintendent from 1861 to 1877. During this time he made several improvements in the machinery used in the mills. His patented adjustable rings were put into the mills in 1866 and 1870, and his patented traveler cleaner in 1868 and 1870. The patented bolster upon which suit is now brought was put in between 1875 and 1877. The date of the patent is October 11, 1875. The defendants

contend that Jencks agreed to give the company the free use of his inventions as an advantage to him in introducing them elsewhere; that he was to make no charge for royalty, and that no royalty was ever paid; that he took the time which belonged to the company to devise and experiment with his improvements; used the tools, workmen, and materials of the company in making the improvements; and tested them in the machinery which was run by the company. As to the two earlier inventions, the plaintiff testifies, in substance, that he was given to understand by Mr. Killey, the agent of the defendant company, that they had a right to the free use of his inventions because he was in their employ; and that he allowed the corporation to use them because he believed this. He further testifies that in August, 1874, he learned that the company had no right to use his inventions because he was in their employ; and that he then told Mr. Killey he had applied for a patent on the bolsters, and should expect the company to pay for them, if the patent was allowed. After the allowance of the patent he says he had an interview with Mr. Killey, in which he stated that the company had deceived him about the first two patents, and demanding pay for the use of his inventions, which resulted in the company giving him \$250 a year for the use of his inventions from the spring of 1876 until about the time he left the employment of the company, in December, 1877. He does not remember that any reference was made as to how long the \$250 a year was to continue, but he thought it was to continue so long as the company used his improvements.

Mr. Killey admits that he told Jencks that the company claimed the right to the free use of his inventions because he was in their employ. He further says that Jencks was very anxious that the company should adopt his adjustable ring, as it would be an advantage to him in introducing his improvements. For this reason, he agreed that the company should pay nothing for the improvement, and that this agreement extended to all improvements, and therefore covered the bolster patent now in controversy. As to the \$250 a year paid to the plaintiff for about a year and a half, Mr. Killey and Mr. Amory, the treasurer of the company, both testify that it was paid as additional salary upon the complaint of Mr. Jencks that the company was not treating him fairly. This position is confirmed by the form of receipt taken from the plaintiff, wherein it appears that the money was paid as additional salary. Again, in a letter from the treasurer to Killey in October, 1877, he notifies him that the business of the company will not warrant the payment to Jencks after that month of his extra salary.

The great weight of evidence is in favor of the position taken by the defendants that the \$250 was not paid as a royalty for the use of the inventions, but was given to the plaintiff as additional salary because of his services to the company. That Jencks was willing and desirous that the company should have the free use of his in-

ventions as an advertisement is supported by the testimony of other witnesses, who had conversations with him. It is also in evidence that the tools and materials used in making the improvements were furnished by the defendant company. Upon the proof before us, we think the defendants have shown a special license to the free use of the patented bolsters and other improvements put into their mills by the plaintiff while in their employ. The courts have held, in cases where the facts were less favorable, as it seems to us, to the defendants, than in the present case, that a license from the patentee was to be presumed. *McClurg v. Kingsland*, 1 How. 202; *Barry v. Crane*, 22 Fed. Rep. 396; *Wilkens v. Spafford*, 3 Ban. & A. 274; *Magoun v. New England Glass Co.*, Id. 114.

We do not think the evidence supports the position taken by the plaintiff that if there was any license to use the patented bolsters it was on condition of the payment of \$250 a year so long as the defendant corporation used them, or during the life of the patent. We are relieved, therefore, from deciding the question whether, if such was the fact, the defendant corporation might not now be sued as an infringer on the ground that it had repudiated the license by its failure to pay the royalty for a number of years. It also becomes unnecessary to decide whether such a parol contract as the plaintiff has sought to make out would not be void under the New Hampshire statute of frauds. It is clear that the statute has no application to the license which we find upon the evidence exists between the parties.

This suit being between citizens of the same state, and there appearing to be a subsisting license between the parties, the court has no jurisdiction, and the bill must be dismissed. *Hartell v. Tilghman*, 99 U. S. 547.

Bill dismissed.

ERVIN and others v. OREGON RY. & NAV. Co. and another.

(*Circuit Court, S. D. New York. May 27, 1886.*)

1. CORPORATION — STOCKHOLDERS — RELATION OF MAJORITY AND MINORITY — TRUST.

When a number of stockholders combine to constitute themselves a majority, in order to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation of the corporation towards its stockholders; and, if they seek to make profit out of it at the expense of those whose rights are the same as their own, they are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud.

2. SAME — SALE — DISSOLUTION.

Although the minority of the stockholders cannot complain because the majority have dissolved the corporation, and sold its property, they may justly complain where the majority, while occupying a fiduciary relation towards the minority, have exercised their powers in a way to buy the property for themselves, and exclude the minority from a fair participation in the fruits of the sale.

3. SAME — FOLLOWING TRUST FUND.

Under the rule of equity which entitles those whose property has been misapplied by an agent or fiduciary to follow it into any form in which it has been converted, and impress it with a trust whenever its identity can be traced, or, at their election, to recover the value of the property in any form into which it has been transmuted, where the majority of the stockholders merge the business and property of the corporation with other business and properties belonging to themselves and embark the whole in a joint venture and sell the corporation's property to themselves, the inquiry, in a question with the minority, is, what is the property worth to the purchasers as a constituent of their general properties?

4. SAME — EQUITABLE LIEN.

The minority of the stockholders have an equitable lien, to the extent of their interest, upon the property of the corporation which has been sold by the majority to themselves, in breach of their fiduciary relation.

5. SAME — ACTION — PARTIES.

Actors in the transaction by which the minority of the stockholders have suffered, are proper parties to suits at their instance.

In Equity.

*William Allen Butler and Thomas H. Hubbard, for complainants.
John F. Dillon and Artemus H. Holmes, for defendants.*

WALLACE, J. When this case was before this court on demurrer, (20 Fed. Rep. 577,) the questions of law arising upon the allegations of the bill were fully considered. It was then determined that, although the majority of stockholders of the Oregon Steam Navigation Company were authorized by the statutes of Oregon, under which the corporation was organized, to dissolve the corporation, dispose of its property, and divide the proceeds despite the opposition of the minority stockholders, and although the majority exercised this authority in the mode which the organic law of the corporation permitted, nevertheless they had no right to exercise their control over the corporate management for the purposes of appropriating the property or its avails to themselves, to the exclusion of a minority, or without rendering them a fair return.

The case is now here upon the proofs, and the following facts appear:

At a meeting, regularly convened, of the stockholders of the Oregon Steam Navigation Company, on the thirty-first day of March, 1880, the sale and transfer of all the property and franchises of the corporation to the Oregon Railway & Navigation Company, and the dissolution of the first-named corporation, were authorized by a vote of a large majority of the shares into which the capital stock of that corporation was divided; and the directors were requested to take the necessary formal action for the purpose. The directors took action; the sale and transfer were concluded; the corporation received, as the purchase price, \$2,300,000; the directors declared a final dividend of 46 cents on the dollar per share, payable only upon the surrender by stockholders of their certificates for cancellation; and the corporation was formally dissolved. This is the sale which is complained of. These proceedings were brought about chiefly by the instrumentality of the defendant Villard, who, early in the year 1879, conceived the scheme of amalgamating the properties of the Oregon Steam Navigation Company, the Oregon Steam-ship Company, and the Oregon & California Railroad Company, and consolidating them under one management, to control substantially the carrying business of Oregon and part of Washington Territory, which had theretofore been controlled by these transportation companies. In February, 1879, he formed a syndicate for the purchase of the property of the Oregon Steam-ship Company. This company, which was an Oregon corporation, then owned and operated a line of steam-ships plying between San Francisco and Puget sound, and other property appurtenant to its business. Its capital, which was originally \$3,000,000, had been reduced to \$1,000,000, and its \$2,000,000 of outstanding mortgage bonds had been pledged for a loan of \$1,200,000. The syndicate bought the franchises and property for \$350,000, and took the assets of the company subject to a debt of \$500,000, to which sum its creditors had consented to reduce their claims. Villard became its president.

At this time the Oregon Steam Navigation Company, also an Oregon corporation, owned and was operating a fleet of steam-boats, barges, wharf property, and real estate, by which it conducted a water transportation business on the Columbia, Snake, and Willamette rivers, in Oregon. It also controlled and operated two short portage railroads along the Columbia river, by means of which freight and passengers were transported at points at which the river was not navigable. It had a capital stock of \$5,000,000, divided into 50,000 shares; it had no bonded debt; its properties and equipment were being constantly improved; and its financial condition was healthy and prosperous. Although, prior to 1878, its dividends had been irregular and small, its business had so largely increased that in that year it paid to its stockholders dividends amounting to 10½ per cent.

In May, 1879, Villard made a contract with one Ainsworth (who for several years had been buying up the stock of the Oregon Steam Navigation Company at low prices, and then owned or controlled a majority of the shares) to purchase of him a majority of the shares of the company, agreeing to organize a new corporation, with a capital stock of \$6,000,000, which was to create its mortgage bonds for \$6,000,000. By the contract between Villard and Ainsworth the new corporation was to acquire the property of the Oregon Steamship Company for \$2,000,000 of its stock and bonds, and was also to acquire the property of the Oregon Steam Navigation Company for \$6,500,000 of its stock and bonds, and Ainsworth was to receive, for the stock sold by him to Villard, 50 cents per dollar on its shares in cash, and 20 cents in bonds and 30 cents in stock of the new company at par. June 13, 1879, the new corporation contemplated by the agreement between Villard and Ainsworth was organized by the name of the Oregon Railway & Navigation Company, its articles of association being filed at that time pursuant to the laws of Oregon. The articles of association authorized the purchase of the property of the pre-existing corporations, and the stock of those companies. The new corporation created \$6,000,000 of mortgage bonds, bearing 6 per cent. interest, and its capital stock was \$6,000,000. June 27, 1879, the new corporation, by the action of its directors, set apart \$2,000,000 of its bonds and stock, to acquire the property and pay the debts of the Oregon Steamship Company; also \$3,557,000 of its bonds and \$3,255,100 of its stock to acquire the stock of the Oregon Steam Navigation Company under the contract made between Villard and Ainsworth; and the next day Villard assigned that contract to the new company. Shortly afterwards the company acquired that stock, and July 7, 1879, credited Villard with the price of 40,712 shares of the stock, at \$6,615,700, as against the bonds and shares which had been set apart. Subsequently the new corporation acquired 5,736 additional shares of stock of the Oregon Steam Navigation Company under an arrangement known as the "Harriott and Noyes contract."

Soon after the new corporation had acquired a majority of the stock of the Oregon Steam Navigation Company it assumed the management of the business of that company by the election of officers and directors, and the selection of agents, who were in its own interests. The Ainsworth party were identified in interest with Villard, and the syndicate which had organized the new corporation; and some of those who belonged to the combination began to represent the future prospects of the Oregon Steam Navigation Company as unfavorable, because its traffic would be depleted by a railroad about to be built by the new company. In the mean time they were purchasing such shares of stock as could be bought at satisfactory prices. During the first five months after the organization of the new corporation, commencing in July and ending December 1, 1879, the net earnings derived from its business operations were \$699,864. Of

these earnings \$559,650 were derived from the interest of the new company in the earnings of the Oregon Steam Navigation Company, including its appendage the Walla Walla & Columbia River Railroad Company. During the same period the total net earnings of the Oregon Steam Navigation Company, and including its share of those of the Walla Walla & Columbia River Railroad Company, were \$687,807, while the earnings of the Oregon Steam-ship Company, the other constituent of the properties of the new corporation, during the same period, were \$135,214.

In a report made by the president to the stockholders of the Oregon Railway & Navigation Company, of the date of January 3, 1880, it is stated that a former estimate made by Villard that the annual earnings of the several companies to be controlled by the new corporation would be sufficient to pay the interest on \$6,000,000 of its mortgage bonds, and a dividend of 10 per cent. on \$6,000,000 of its capital stock, "had been more than realized by the traffic of the half year just closed," and that the prospects of the company for 1880 were even more promising than the results of the last six months would indicate.

Early in February, 1880, the directors of the new corporation made a formal proposition to the directors of the Oregon Steam Navigation Company to purchase the property and franchises of that company at a valuation to be agreed upon between the two boards, or by two appraisers, one to be selected by each company. Thereupon the directors of the Oregon Steam Navigation Company adopted a resolution setting forth that the new company, being about to construct railroads which would render the most profitable part of the business of the Oregon Steam Navigation Company nearly worthless, and would greatly depreciate the value of its property, had made a proposition that was greatly to the advantage of the Oregon Steam Navigation Company, and that it was advisable that such proposition be accepted, subject to ratification at a stockholders' meeting; and it was accordingly resolved to accept the proposition, and one Brooks was appointed an appraiser on the part of the corporation. One Biles was selected by the new company as its appraiser. Within a few days the two appraisers agreed upon the valuation of \$2,300,000. These proceedings were followed by the meeting of the stockholders of the Oregon Steam Navigation Company of March 31, 1880, at which the sale was ratified, and the dissolution of the corporation voted. At that meeting 40,552 shares were voted by the new company in the name of its trustee; 5,161 shares were voted in the names of Harriott and Noyes, being stock actually belonging to the new company; and 536 shares were voted by other persons in the interest of the new company.

At the time of the making of the Ainsworth contract, the property of the Oregon Steam Navigation Company was scheduled, as a basis for the purchase, at a valuation of \$3,320,000, exclusive of the fran-

chise. No proposition was ever made by the defendants to the stockholders not in the combination with the Ainsworth and Villard parties, to allow them to come in on the same terms given to the Ainsworth parties. The original plan of Villard to acquire the property of the Oregon & California Railroad Company seems to have been abandoned, and, instead of acquiring this property, new railroads were projected and commenced by the new corporation. At the time of the sale the new company had expended about \$2,100,000 in the construction of these new railroads, and upon the improvement of the property of the corporation generally.

This is a history, in outline, of the facts upon which the complainants rely. The bill contains the following allegations:

"And your orators aver and charge that the proceedings by which the defendant the Oregon Railway & Navigation Company has pretended to fix the value of your orators' stock at 46 cents on the dollar, and to end the rights of your orators to participate in the profits of said business, were a device and a sham, for the reason, among others, that, in making the pretended purchase of the Oregon Steam Navigation Company property, the Oregon Railway & Navigation Company was in fact both buyer and seller, and fixed the prices at which it bought, and for the reason that said price was grossly and fraudulently inadequate, and was fixed by means of a fraudulent scheme intended to apply to the minority of stockholders alone, of whom were your orators, and not to the majority stockholders, to-wit, said Oregon Railway & Navigation Company itself."

The proofs, which consist chiefly of the official records of the corporations, the reports and communications of their officers and agents, including those of Mr. Villard, and the oral testimony of Villard, and others person identified in interest with him, or with the corporation defendant, show very clearly that from the time of the organization of the Oregon Railway & Navigation Company it was the purpose of those who controlled it to absorb the Oregon Steam Navigation Company, and make the franchises, property, and traffic of that company a dominant factor—*First*, in floating the securities of the new corporation; and, *secondly*, in contributing to establish it permanently as a successful concern. They never contemplated winding up the business of the old company, and distributing the assets among its stockholders, otherwise than as a formal mode of doing what they could not do by legal sanction. What they intended to do, and what they practically did, was to effect a consolidation of the old company with the new, using as the means for the end the statutory power which authorized a majority of stockholders to dissolve the corporation, settle its business, and dispose of its property. This is manifest from Mr. Villard's statements, made in his report as president to the stockholders of the Oregon Railway & Navigation Company. This report presents a general review of the operations of the company for the year commencing July 1, 1879. He says:

"An important problem calling for solution by the management during the past year was the change in the relations of our company to the several corporations controlled by it from an indirect to a direct ownership. The

most direct mode of transforming the control into an actual ownership was the formal consolidation of the controlled companies with our own. As regards the Oregon Steam-ship Company our ownership of this entire stock rendered this an easy matter. But in the case of the Oregon Steam Navigation Company the fact that there was a minority of outstanding stock made a consolidation a more complicated transaction. Arrangements were first made to purchase for the company as much of the minority stock as could be obtained in the open market at reasonable prices. Finally it was decided, under the advice of counsel, to effect the object definitely, in accordance with the Oregon law, by the purchase of the property of the Oregon Steam Navigation Company for a proper consideration."

The plan of Villard and his coadjutors was practically accomplished early in July, 1879, when the new corporation acquired four-fifths of the stock of the old, and, by its officers and agents, assumed control of the affairs of the old company. It was then within the power of the new corporation to do at any time what was done by its vote at the meeting in the following March. It was expedient, however, in the interests of those who controlled the situation, to postpone decisive action until more of the outstanding shares of the old company could be acquired on terms satisfactory to the purchasers. But for all substantial purposes, from July, 1879, to the time of the dissolution, the franchises, property, and business of the old corporation were embarked in a joint venture with those of the new concern.

The defendants have adjusted their own interests on the basis of a consolidation of the two corporations and a continuance of their business as a joint venture; but they now insist that the interests of the minority stockholders, who have not been permitted to participate with them, shall be adjusted on the basis of a dissolution and a cessation of the business which they originally associated together to conduct. More than this, the defendants insist that the value of the assets, for the purpose of determining the interests of the minority, is fixed by the appraisal of persons selected by the defendants themselves, in whose selection the minority had no voice; and they have assumed to deny all recognition to those of the minority who will not consent to surrender their stock and accept a final dividend upon the basis of this appraisal.

Plainly, the defendants have assumed to exercise a power belonging to the majority, in order to secure personal profit for themselves, without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority.

It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression practiced upon the minority under the guise of legal sanction, which fall short of actual fraud. This is a consequence of

the implied contract of association, by which it is agreed, in advance, that a majority shall bind the whole body as to all transactions within the scope of the corporate powers. But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to pervert or destroy the original purposes of the corporators. *Livingston v. Lynch*, 4 Johns. Ch. 573; *Hutton v. Scarborough Cliff Co.*, 2 Drew. & S. 514; *Brewer v. Boston Theatre*, 104 Mass. 378; *Keane v. Johnson*, 9 N. J. Eq. 401; *Rollins v. Clay*, 33 Me. 132; *Clinch v. Financial Corp.*, 4 Ch. App. 117; *Clearwater v. Meredith*, 1 Wall. 25. It is for this reason that the majority cannot consolidate the corporation with another corporation, and impose responsibilities and hazards upon the minority not contemplated by the original enterprise, unless express statutory authority for this purpose is conferred upon the majority. It is no more repugnant to the purposes of the association to permit the majority to merge and consolidate the corporation with another corporation than it is to permit them to dissolve it, and abandon the enterprise for which it is created, when no reasons of expediency require this to be done. A dissolution under such circumstances is an abuse of the powers delegated to the majority. It is no less a wrong because accomplished by the agency of legal forms.

In the language of BLACKBURN, J., in *Taylor v. Chichester Ry. Co.*, L. R. 2 Exch. 379:

"As the shareholders are, in substance, partners in a trading corporation, the management of which is intrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds, for the purpose of carrying out the original speculation."

When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust*. *Peabody v. Flint*, 6 Allen, 52, 56; *Hardy v. Metropolitan Land Co.*, L. R. 7 Ch. 427; *Stevens v. Rutland R. Co.*, 29 Vt. 550. When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund pro-

ductive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it at the expense of those whose rights in it are the same as their own are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud. *Jackson v. Ludeling*, 21 Wall. 616, 622; Story, Eq. § 323.

Among the disabilities imposed by courts of equity upon those who occupy a fiduciary relation towards others, respecting property which is to be administered for beneficiaries, is that which precludes the fiduciary from purchasing the property on his own account, without such a full and complete understanding, in advance, with the beneficiaries, as will repel all inferences that the fiduciary intended to derive any peculiar advantage for himself. The reason why this disability does not apply to a mere dry trustee is because his position gives him no vantage ground either of superior information or undue influence over the *cestui que trust*. *Parkes v. White*, 11 Ves. 226; *Perry, Trusts*, § 195. The rule is stated in Sugden on Vendors, (page 566, 13th Ed.,) as follows:

"It may be laid down as a general proposition that trustees, * * * or any persons who, being employed or concerned in the affairs of another, have acquired a knowledge of the property, are incapable of purchasing the property except under the restrictions which will shortly be mentioned."

The fiduciary cannot retain his bargain by showing that the sale was public, or that the price was fair, or that there was no intention on his part to gain an unfair advantage. Where he has a duty to perform which is inconsistent with the character of a purchaser, he cannot divest himself of the equities of the beneficiaries to demand the profits that may arise from the transaction. *Greenlaw v. King*, 3 Beav. 49, 61; *Gibson v. Jeyes*, 6 Ves. 278; *Torrey v. Bank of Orleans*, 9 Paige, 663; *Michoud v. Girod*, 4 How. 555; *Gardner v. Ogden*, 22 N. Y. 327; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314.

Applying these principles to the case in hand, although the minority of stockholders cannot complain merely because the majority have dissolved the corporation and sold its property, they may justly complain because the majority, while occupying a fiduciary relation towards the minority, have exercised their powers in a way to buy the property for themselves, and exclude the minority from a fair participation in the fruits of the sale. In the language of MELLISH, L. J., in *Menier v. Hooper's Telegraph Works*, 9 Ch. App. Cas. 350, 354: "The majority cannot sell the assets of the company, and keep the consideration, but must allow the minority to have their share of any consideration which may come to them." The minority stockholders are therefore entitled to demand their fair share in the transaction, and to be placed upon terms of equality with the majority. It may be that the property of the old company was not worth more than the sum fixed by the appraisers, estimating its value with a view of the winding up of the corporation; but for several months the prop-

erty had been used by the defendants in a joint venture with the other property of the new corporation, and its value, at the time of the sale, should be estimated at what the property was worth as then situated. This results from the rule of equity which entitles those whose property has been misapplied by an agent or fiduciary to follow it into any form in which it has been converted, and impress it with a trust whenever its identity can be traced, or, at their election, to recover the value of the property in any form into which it has been transmuted. Story, Eq. §§ 1261, 1262. If it was worth much more as a constituent of the new corporation than it would have been worth otherwise, the minority stockholders are entitled to the benefit of the increase. The majority stockholders are not to be permitted to segregate it from the conditions in which they have placed it, for the purpose of fixing its value to the minority. For this reason the estimate made by the appraisers is not controlling, even if it is of any value in determining the price for which the defendants should account. This is so, not only because the appraisers were the agents of those who were at the same time negotiating as the purchasers and the sellers of the property, but also because they adopted a basis of valuation which will not be sanctioned by a court of equity. As the new corporation sold the property to itself, the inquiry is, what was the property worth to the purchaser as a constituent of its general properties?

It is difficult, if not impossible, to determine with precision what the property was worth as a component of the new corporation. When Villard bought the stock of the old company under the Ainsworth contract, he agreed to take it at the price of 50 cents on the dollar (par value) cash, and 50 cents in the securities of the new company. When the new corporation assumed this contract, and took an assignment of it from Villard, the stock actually cost the new company, by its arrangement with Villard, about 167 cents at par in its own stock and bonds. As the new company paid for this stock partly in its own securities, and the value of those securities was contingent upon the future success of the new company, it is not fair to assume that either of the defendants regarded the stock of the old company as worth the sum of 167 cents upon the dollar. They were willing to pay this price in the securities of a company which they expected would prove a financial success. But the transaction was a speculative one. It turned out, however, that, as soon as the defendants acquired control of the old company, and were able to merge its business with that of the new, whether the result was due to more efficient management, or to an unexpected development of traffic, or to circumstances quite independent of the new order of things, the new corporation became a financial success; and that the property and business of the old company was the factor of chief value in its prosperity. The new company immediately began to derive an income sufficient to pay the interest on its bonds and large dividends to its stockholders, and over three-fourths of this income

arose from its share of the earnings of the old company. Between the fall of 1879 and the spring of 1880 the stock of the new corporation, which had been listed in the mean time on the stock exchange, sold at prices ranging from 94 to 122.

If the minority stockholders had been offered the equivalent of the par value of their shares at any time before the results of the first five months of the business of the new company had been ascertained, it would seem that this would have been a favorable proposition in view of the past history of the old company. On the other hand, such an offer would have seemed inadequate if made after these results had been ascertained, as shown by the report of the operations of the new company to January 1, 1880, to its stockholders. At the time of the sale of March 31, 1880, the new company had expended, upon the construction of new railroads and the improvement of its property, about \$2,100,000. It retained in its treasury at that time about \$630,000 of its mortgage bonds, and about \$659,000 of its unissued capital stock. The market price of its shares on the stock exchange is not a reliable criterion of the true value of its property. Indeed, the mortgage bonds of the company were being sold on the stock exchange, in March, 1880, at prices ranging between 92½ and 94½. But the exhibit of its earning capacity, and the cost of its constituent properties, together with the sums expended in their improvement, would indicate that the value of its property approximated within \$2,000,000 or \$3,000,000 the sum at which it had been capitalized. The proofs also indicate that the traffic of the new company was considerably larger than that which belonged, before the consolidation, to the old company and to the Oregon Steamship Company combined. Some of the lines of the new railroad which had been built by the new company would have diverted the traffic which would otherwise have accrued to the old company.

If it were practicable to ascertain accurately the value of the property of the old company, considering it as a component of the new corporation, the proper course would be to order a reference to a master; but there are so many elements of uncertainty in arriving at a just conclusion that it seems as well to determine the question now as to refer it for further proofs. In view of all the evidence, and without entering upon it in detail, the conclusion is reached that the value of the whole property of the new corporation, at the time of the sale, was from \$9,000,000 to \$10,000,000, and that of the old company should be fixed at the sum of \$5,500,000, including the franchise. Upon this basis the complainant is entitled to a decree, with interest from the time of the sale.

The acts of Villard, although he was a director of the old company at the time of the sale, are not to be discriminated from the acts of the majority of the stockholders, of whom he was the representative. The circumstance that his position was more technically that of a trustee towards the minority stockholders than was that of the new

corporation, as the majority of stockholders, does not essentially alter or affect the rights of the parties. All that he did was sanctioned by the majority.

The complainants are adjudged to have an equitable lien, to the extent of the sum due them, upon the property of the old corporation now in the hands of the new corporation, prior to the lien of its stockholders, but not prior to the lien of the holders of its mortgage bonds. *Ferris v. Van Vechten*, 73 N. Y. 113. Villard is a proper party to the suit as one of the actors in the transaction by which the complainants have suffered. He cannot escape liability merely because his conduct has been sanctioned by the majority of stockholders.

PITTS v. CLAY and others.

(Circuit Court, N. D. Iowa, W. D. May Term, 1886.)

1. TAXATION—VALIDITY—INTEREST OF UNITED STATES IN LAND.

A settler located a bounty land-warrant upon the premises in dispute, and received a duplicate of location; but the commissioner of pensions addressed a notice to the commissioner of the general land-office, requesting that the issuance of a patent be withheld, on the ground that the assignment of the warrant was a forgery. After a lapse of some years the applicant furnished a new warrant, which was substituted for the one he formerly held, and the patent for the land was issued to him thereupon. *Held*, that during the period which elapsed between the filing of the original, and the filing of the substituted, warrant the United States had such an interest in the land as prohibited taxation under the laws of the state; and that tax deeds based upon assessments during that period are void.

2. ESTOPPEL—ACTION TO QUIET TITLE—PUBLICATION—DECREE BY DEFAULT.

A party is not barred from asserting title to realty by reason of a decree rendered in a proceeding to quiet title against one through whom the claimant derives title, where the antecedent owner was a non-resident, and the only notice given of the pendency of the suit was by publication in a newspaper; there being no appearance in that cause, and the decree being rendered upon a default.

In Equity. Bill to quiet title.

Barrett & Bullis, for complainant.

Struble, Rishel & Hart and *C. R. Marks*, for defendant.

SHIRAS, J. The subject of controversy in this cause is the title to 80 acres of land situated in Sioux county, Iowa. The complainant claims title under a patent issued by the United States to Jesse Williams, dated March 8, 1871. The defendants claim title under two tax deeds executed by the treasurer of Sioux county, Iowa, one dated December 14, 1865, and the other, February 3, 1873, both being based upon sales of the property for delinquent taxes assessed upon the realty prior to the year 1870. The evidence shows that on the second day of June, 1857, Jesse Williams located bounty land-war-

warrant No. 60,801 upon the premises in dispute, in the United States land-office at Sioux City, and received a duplicate certificate of location, in the usual form. On the thirtieth of May, 1857, two days before the location of the warrant by Jesse Williams, the commissioner of pensions had addressed a letter to the commissioner of the general land-office, requesting that officer to withhold the issuance of a patent upon warrant No. 60,801, on the ground that the assignment thereof was a forgery. On the nineteenth of June, 1863, the commissioner of the land-office addressed a letter to the register of the local office at Sioux City, requesting him to inform Jesse Williams that the commissioner of pensions had cancelled warrant No. 60,801 for forgery in its assignment, and in the papers on which its issue was obtained; and further stating that, as it was to be presumed that Jesse Williams had bought the warrant in good faith, and had no connection with the fraud, he could secure the issue of a patent for the land by substituting a valid warrant, or by making a re-entry for cash. On the fourth of November, 1870, Williams furnished warrant No. 113,546, which was substituted for No. 60,801, and on the eighth of March, 1871, the patent was issued to him.

The first question to be determined is whether, under this state of facts, the land could be legally subjected to taxation by the state and county authorities prior to the fourth of November, 1870; for if the United States had such an interest in it up to that date as prohibited taxation under the laws of the state, it follows that the tax deeds are wholly void; they being based upon assessments made prior to the year 1870.

Upon part of the defendant it is claimed that the case comes within the rule laid down in *Witherspoon v. Duncan*, 4 Wall. 210, *Carroll v. Safford*, 3 How. 441, and other cases, wherein it is held that when the contract of purchase is complete, and the United States holds only the naked legal title in trust for the purchaser, the state has the right of taxation. Complainant, not questioning this rule, claims that in this case the contract of purchase was not complete until the substituted warrant was filed in the local land-office, in November, 1870, and that until that was done the United States remained the owner of the land, and consequently the same was not taxable under the doctrine announced in *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444; and *Railway Co. v. Rockne*, 6 Sup. Ct. Rep. 201,—wherein it is held that the rule that land may be taxed before conveyance of the legal title by the United States is "only applicable to cases where the right to the patent is complete,—the equitable title fully vested, without anything more to be paid, or any act to be done, going to the foundation of the right."

Upon part of the defendants it is contended that the commissioner of pensions had no legal right or authority to declare warrant No. 60,801 void for fraud or forgery, and that his act in so doing can have no legal significance. Granting this to be so, it still appears

that the general land-office refused to grant a patent upon the location made of that warrant, and required either the substitution of another warrant or a re-entry for cash. Another warrant having been substituted, the patent issued; but can it be said that Williams' right to a patent was complete until the substitution was made? Had Williams contested the right of the commissioner of the land-office to refuse a patent on the ground of the invalidity of warrant No. 60,801, and established its validity, it might be that in such case it should be held that his equitable title had been perfected at the date of the original entry. This he did not do, however, but, on the contrary, he acquiesced in the holding of the department, substituted another warrant, and procured the patent thereon.

To sustain defendants' theory that Williams had fully established his equitable title by locating warrant No. 60,801, it must appear that the same was a valid warrant. There is no direct evidence in the case upon that question. The department refused to recognize it as a valid instrument, and Williams acquiesced in such decision. This court certainly cannot be asked to reverse such action on part of the department without cogent evidence of its invalidity, even if the power so to do exists under any circumstances. In fact, the equitable title in Williams was not perfected until the substituted warrant was furnished. Until that was done, it was wholly uncertain whether Williams would ever pay for the land, and until a valid warrant was substituted, or the money was paid, it cannot be said that Williams had perfected an equitable title to the land. Until the substituted warrant was furnished, the payment for the land was not made, and until payment was made, the United States had an interest in the land which debarred the state from taxing the same; and hence the tax deeds, being founded upon taxes assessed prior to the year 1870, must be held to be invalid and void.

It is further contended, on behalf of defendants, that complainant is barred in this action by reason of a decree rendered by the circuit court of Sioux county, in a proceeding brought to quiet title against one McConaughy, through whom complainant derives title. The petition in that cause was filed December 10, 1873, at which time the title had passed from the United States to Williams, and from the latter to McConaughy. The evidence shows that McConaughy was a non-resident of Iowa; that the only notice given of the pendency of the suit in said circuit court was by publication in a newspaper in said Sioux county; that there was no appearance in that cause for defendant, the decree being rendered upon a default, and is to the effect that the petitioners in that cause were the owners of the land; and that the defendant was forever barred from asserting any right or title to the land. The question arising from this state of facts is whether McConaughy and his grantee are bound by a decree of this nature, rendered by default, upon service by publication only. I am not able to distinguish this case from that of *Hart v. Sansum*, 110

U. S. 151, S. C. 3 Sup. Ct. Rep. 586; and following the ruling therein made, I am compelled to hold that the decree in question is not a bar to the present suit.

It follows that complainant is entitled to a decree, as prayed for, quieting his title against all the defendants.

It appears from the evidence that the defendants have paid the taxes for several years upon these lands, including interest and certain penalties, and complainant in his bill offers to repay the same. The decree will therefore provide for the repayment of the sums paid by the defendant, with legal interest, the same to be a lien upon the land as against complainant, and in favor of defendants.

PACIFIC R. Co. of Mo. v. CUTTING, Jr., and others.

(Circuit Court, S. D. New York. April 3, 1886.)

CORPORATION—DISTRIBUTION OF FUND—CROSS-BILL—BILL OF INTERPLEADER.

In an action by a corporation for the equitable distribution of a specific fund, the court will consider this fund only, and will not settle all accounts between the corporation and its stockholders; and if a stockholder desires a general distribution of all the property, he must seek relief by an original bill, or an original bill in the nature of a cross-bill.

In 1885 the Pacific Railway Company of Missouri filed its bill in equity asking for a receiver, the equitable distribution of a certain fund in the hands of its officers, and for an injunction to prevent the bringing of suits by stockholders for the recovery of the fund. Robert S. Cutting and Peter Marie were, by order of court dated April 20 and May 8, 1885, appointed receivers of said fund. By interlocutory decree dated December 19, 1885, the injunction was granted and the matter referred to Edward K. Jones, Esq., with instructions to hear and determine who was entitled to participate in the distribution of said fund. All the defendants answered, substantially admitting the averments of the bill, and setting up their respective claims to participate in the fund, except one Kerens, who, by an *ex parte* order, became a party to the suit. He set up that from the proceeds of the settlement of another suit certain stockholders had received dividends, which should be taken into consideration in the distribution of the present fund. The remaining facts material to the issue are stated in the master's certificate.

The master in this case requested the instruction of the court upon the following question and accompanying statement:

To the Honorable Judges of the Circuit Court of the United States within and for the Southern District of New York, sitting in Equity:

The undersigned, the master appointed by the interlocutory decree made in this cause on the nineteenth day of December, 1885, respectfully asks the court for its special instruction and direction upon the following question and accompanying statement; that is to say, whether or not, under the pleadings and the interlocutory decree, it is competent for the master, at the instance of a dissatisfied stockholder, admitted as a party to the record, or otherwise coming in and proving his claim, to take into account, as against other

stockholders coming in and claiming to share in the fund in court, moneys obtained by such stockholders from another fund alleged to belong to the corporation, and to be rightfully distributable among all the stockholders alike.

The facts, as I gather them incidentally from the examination of collateral questions, appear to be these: In the year 1875 a suit was brought in the circuit court of the United States, at St. Louis, Missouri, to foreclose the mortgage given by the plaintiff to secure what were known as its "Third Mortgage Bonds." A portion of the stockholders of the company, deeming the mortgage to have been unlawfully issued, and claiming that there was fraud and collusion in its foreclosure, met together, and appointed a committee to represent them, and to take such measures in their behalf as the committee should deem proper and effectual to defeat the foreclosure, and to set aside the mortgage. This committee resorted to various proceedings with a view to prevent the foreclosure, and, pending their efforts in that behalf, also entered into negotiations with the late Cornelius K. Garrison, then, with his associates, in substantial and potential control of the plaintiff, and holding most of its third mortgage bonds, with a further view of effecting a compromise. The result of those negotiations, as I understand the facts, was an agreement between Mr. Garrison and the committee representing the stockholders above referred to, that, if opposition to the foreclosure were withdrawn, he (Garrison) and his friends would purchase the property of the railroad at the foreclosure sale, organize a successor company, and give to each stockholder in the plaintiff company a corresponding number of shares in the new corporation. Some misunderstanding between the parties seems to have taken place, by reason of which this agreement collapsed, and then a new promise, resting upon the same condition as to withdrawal of opposition to the foreclosure, but upon a different basis as to the capital stock of the proposed new company, was made by Garrison. This new promise, it is alleged, was that Garrison should organize a successor corporation, as before contemplated, and give to those stockholders only who were represented by the committee shares in the proposed new company equal in number to their holdings in the old or plaintiff company. Opposition to the foreclosure suit having been finally withdrawn, a decree of foreclosure and sale of the property of the railroad covered by the mortgage was thereupon made and executed. A dispute then also arose as to the latter agreement, and it appears that Garrison wholly refused to fulfill the contract. A meeting of stockholders of the plaintiff corporation was afterwards called, and most of the gentlemen composing the stockholders' committee were appointed upon another committee, authorized, it is claimed, to act for and in the name of the corporation; and it has been stated to me in the proceedings in this case that the object in altering the composition of the corporation committee from that of the stockholders' committee was solely to give places upon the corporation committee to citizens of the state of Missouri. The corporation committee instituted various litigations to set aside the foreclosure, and otherwise, which ultimately resulted in the fund now brought into court. The old or voluntary committee sued Garrison on his contract. All the litigations were settled at one and the same time, and the terms of settlement of each respectively are embraced in one document, which has been produced, proved, and put in evidence before me. Five hundred thousand dollars, or thereabouts, was paid by Garrison in settlement of the personal suit against him, and \$500,000, less the sum of \$41,000, was also paid in settlement of the suits maintained by the corporation. It is alleged before me, and thus far not denied, that the money received from Garrison in settlement of the suit against him personally has been distributed among those stockholders only whose shares were placed at the disposal of the original or voluntary committee, the same being somewhat more than a majority of the whole number of shares. All the shares represented by the voluntary committee, and which participated in the dis-

tribution of the fund realized from the settlement of the suit against Garrison personally, have been proved before me; and the holders thereof, or those acting for them, claim the right to also participate in the fund now in court. Certain other stockholders, who have also proved their claims before me, but who did not participate in the outside fund, contend that those stockholders who obtained the benefit of the outside fund should not be allowed to participate in the present fund until an account be taken against them of the dividend they have received, the contention being upon the alleged ground that the outside fund should have been turned over to the corporation and distributed, as it is proposed to distribute the present fund, among all the stockholders indiscriminately. In other words, the contention is that the moneys received from the settlement of all the suits should be treated in this proceeding as but one fund, and those stockholders who received a distributive share thereof should be charged with such share in the present distribution.

The question is then raised whether or not the stockholders who did not participate in the outside fund are entitled to have the distribution thereof taken into account against those stockholders who have received its benefits, such stockholders being all before the master. The particular point to be decided at the present stage of the case is whether or not an inquiry should be directed in order to determine this question. The subject has been argued before me by counsel, and the proposed inquiry is resisted by some of them with unusual energy. I have no doubt whatever in my mind as to the proper disposition of the question, and while I am clothed with full power to decide it myself, I have nevertheless thought it but fair to the parties, and a just deference to the able and experienced counsel with whose views I find myself opposed, that I should submit the matter to the direction of the court. It being the unanimous desire of counsel, I will state my own opinion upon the subject, and briefly summarize the reasons upon which it is based.

I think the inquiry entirely proper and competent; that the stockholders raising the questions are entitled to have it disposed of on the merits; and that the ends of justice will be subserved by its determination in this case.

The stockholders taking the position stated could, in my judgment, raise substantially the same question in either of three ways: *First*, they could have filed an original bill, or an original bill in the nature of a cross-bill, to compel the stockholders who received the outside fund to pay the same into the treasury of the corporation, or otherwise account for it to the stockholders; *second*, they could have filed a cross-bill, in the present case, for the same purpose; or, *third*, they can raise the question before the master in the form suggested, as upon an accounting between themselves and the stockholders whose shares received the benefit of the outside fund.

The grounds upon which the inquiry is resisted, as I understand them, are these: *First*, because, there being no cross-bill filed, the subject does not come within the purview of the suit; *second*, because of a supposed defect of parties; and, *third*, because, if a determination of the question were made, the final decree in this case would not bind the stockholders.

All these objections, it will be seen, are more or less involved with each other. The present suit is of an anomalous character, but may be said to fall within the general definition of bills in the nature of bills of interpleader, and also partaking of the nature of an equitable administration. It is brought by a corporation which has lost its vitality and energies as a going concern, and the object sought in the liberation of a fund in its hands—*First*, by payment of the claims of creditors; and, *secondly*, by the distribution of the residue among its shareholders. The purview of the suit is, in my judgment, best defined in the interlocutory decree, which directs the master "to ascertain all persons who are entitled to participate in the distribution of fund in court, and the amount of their respective claims."

The subject of pleadings and practice in equity, from the nature of the cases cognizable in those courts, is divided into two general branches, in the first of which may be grouped all those cases falling within the general designation of "hostile litigation;" and in the other, that class which may be termed "administrative." Mitf. & T. Eq. Pl. Introd. 10, 11. In cases of "hostile" or "contentious" litigation, the court renders its final decree *secundum allegata et probata*. In cases of "administrative" jurisdiction, the court relaxes its strictness, and moulds its procedure to suit the exigencies of the particular case. Mitf. & T. Eq. Pl. *supra*; Story, Eq. Pl. § 99.

This suit, as I understand it, comes within the definition of that class of cases termed "administrative." The interests of all the shareholders are brought before the court by impleading suitable representatives, it having been impracticable to join all the defendants by name, because many were unknown, and, if they had been known, they form too numerous a body to be made parties. The theory upon which the bill is framed as to parties is therefore the joinder of all the stockholders as defendants. Until the stockholders come in, they are parties by representation merely, and, though bound by the decree as far as the fund is concerned, they are not prevented from afterwards litigating the same question in another suit. But when they come in, whether by intervening upon the record or before the master, they become parties to the suit as effectually as if originally joined by their individual names. Their specific mention and enumeration in the caption of the bill, in the prayer for process, and in the original writ, would not, as I understand the rule in cases of this kind, make a particle of difference in their character as parties. Their interests are cared for by the final decree precisely as if they had been originally joined by name instead of description, and their rights in the premises, as adjudicated by the court, will be finally and conclusively settled. Mitf. & T. Eq. Pl. 46, 474; *Neve v. Weston*, 3 Atk. 557; *Giffard v. Hort*, 1 Schoales & L. 409, decided by Lord REDESDALE; Story, Eq. Pl. § 99. Parties coming in before the master, being bound by the decree, have the right to appeal. The reason is that the decree binds their interests. *Giffard v. Hort*, *supra*, cited 2 Daniell, Ch. Pr. (4th Ed.) 1461. And if such parties bring a new suit, a plea of the pendency of the former suit will be allowed. *Neve v. Weston*, 3 Atk. 557. And such parties are so far bound by the decree that, if they neglect to litigate their rights, they are forever barred from afterwards asserting such rights in other proceedings. *Sawyer v. Birchmore*, 1 Keen, 391, 825; *Cattell v. Simons*, 8 Beav. 243; S. C. 9 Jur. 418; *Hull v. Falconer*, 11 Jur. (N. S.) 151.

The stockholders in the present case may be regarded, in considering the question now under notice, as composed of two groups: (1) Those who united together to obtain redress against the fraudulent mortgage, and its wrongful foreclosure, (being somewhat in excess of a majority); and (2) those who remained neutral, and refused to join in, and co-operate with, the movement. All the stockholders of the first group have come in before the master. A great number of those of the second group have also come in before the master.

Now, the interlocutory decree provides that the master shall, *inter alia*, ascertain all the stockholders "who are entitled to participate in the distribution of the fund brought into court, and the amount of their respective claims."

The question, then, reduces itself to this: The stockholders of the second group say that those of the first group shall first have debited against them the dividend they have already received before they shall participate in the present fund. I am unable to discover any objection whatever, technical or otherwise, for refusing the adjudication of this question in this case. It seems to me that the case should proceed, as between these stockholders, upon the analogies of an accounting between partners, in which it would be

indubitably competent and proper for one party to show that the other had collected funds belonging to the partnership, and failed to turn them over to the firm. Or, to recur to another analogy, take the case of a general administration in equity. No one, I think, will deny that in such a case it would be entirely competent for one distributee, or a group of distributees, to reduce the distributive share of another by proving an advancement. No cross-bill is necessary, in my judgment, to enable the stockholders in this case to demand this adjustment. A cross-bill is necessary only in cases where defendants demand *affirmative* relief. This relief is not affirmative. It may rather be said to be negative and passive. Issues such as this between defendants are always determined by courts of equity irrespective of the state of the pleadings, and without formal adversary proceedings; and if, after hearing the parties, the questions are passed upon and decided by the court, they are final and conclusive. *Corcoran v. Chesapeake & O. Canal Co.*, 94 U. S. 741; *Louis v. Brown Tp.*, 109 U. S. 162; S. C. 3 Sup. Ct. Rep. 92. The standard for determining *res adjudicata* is whether or not the same evidence will support both issues. Tested by this, the stockholders opposing the investigation demanded need not, as I apprehend, trouble themselves with the fear that they will be again molested with the agitation of this question. The evidence necessary to settle the inquiry proposed in this case must be precisely the same in every form in which this issue can be raised, the essentials of which are the matters involved in the question whether or not the outside fund belonged to all the stockholders, or to that portion among whom it has been divided. I do not express, or even suggest, any opinion whatever upon the merits of the question involved. I merely intend to say that, in my opinion, it is a fit subject of inquiry to enable the court to finally adjudicate this case; and that, as I understand the practice, it is a novel doctrine that a court of equity, with its plenary powers, and its boasted flexibility of procedure, cannot investigate and determine the question now raised. If the contention has merit, the stockholders raising it, aside from their estoppel hereafter, should not be compelled to witness the distribution of the present fund, and be remitted to other proceedings against the hundreds of individual stockholders who received the outside fund. If the contention has no merit, the resisting stockholders should not be harassed with litigation in the future.

The principles above alluded to are, as I understand the practice in equity, so plain and well established that their mere statement will at once command assent. I have, therefore, not deemed it necessary to go into an elaborate examination, discussion, and citation of the authorities.

EDWARD K. JONES, Special Master.

To which the court, after hearing counsel, returned the following.
In Equity.

Charles M. Da Costa, for complainant.

Augustus C. Brown, for defendants Cutting and Marie.

Clifford A. Hand, for defendant Bodine and others, stockholders.

William H. Sage, for defendant Kerens and other stockholders.

Daniel H. Chamberlain, for defendant Cowdrey.

Jerome & Nason, for other stockholders.

WALLACE, J. A fund is in court for distribution among the stockholders of the complainant according to their respective interests. One class of participants insists that participants of another class should not share equally in the distribution, because the latter have appropriated to themselves exclusively another fund belonging to the cor-

poration, the proceeds of which should be distributed equally among all the stockholders. If the suit under which the fund is brought here for distribution were one to settle all accounts between the corporation and its stockholders, and to distribute all its assets according to the respective rights of the stockholders, then it might well be urged that the court must ascertain what moneys or property belong to the corporation, whether actually brought into court or not,—and if it should appear that moneys belonging to it have been appropriated by one class of stockholders to the exclusion of another class, a decree would be made proceeding upon that basis. If the fund actually brought in would be sufficient to satisfy the just claims of the stockholders who did not share in the fund which has been appropriated by the others, the decree would provide for a distribution by which the claims of the former would be satisfied in full, and the claims of the latter reduced by deducting what they had already received. But this suit is brought to distribute a specified fund, which the corporation is unable to distribute by its own instrumentalities. By reason of different relations sustained towards this fund by different classes of stockholders, the corporation is equitably required to discriminate between them, and to recognize the right of one class, by reason of the expenditures they have incurred to produce the fund, to have an additional allowance made to them which will reimburse them. The claim of this class for reimbursement is one against the corporation, and is an equitable lien upon the fund which they have realized for the corporation. Further than this the corporation does not seek to adjust the rights of stockholders to share in its property.

Upon the facts alleged by Mr. Kerens, and those who unite with him, the moneys received by the stockholders of the Cowdrey committee belong to the corporation if they do not belong to those stockholders personally. An action to recover these moneys must be brought by the corporation, unless it refuses to sue, and a case can be made authorizing a stockholder to sue in behalf of the corporation. A decree in such a suit would conclude all the stockholders as well as the parties defendant. The determination of an issue in this suit between stockholders of one class and those of another, concerning the respective rights of each in a fund not sought by the bill to be brought into court for distribution, might conclude the immediate parties to the issue, but certainly would not adjudicate the rights of others. The stockholders of the Cowdrey committee could not invoke the adjudication as an estoppel if they should succeed, when other stockholders, not parties to the issue, might seek to retry the questions involved. If any stockholders are entitled to require the corporation to make a general distribution of all the property among the stockholders, they must seek relief by an original bill, or an original bill in the nature of a cross-bill.

The master is therefore directed to proceed in conformity with these views.

CORBIN v. GRAVES.

(Circuit Court, N. D. Iowa, E. D. April Term, 1886.)

PARTNERSHIP—SPECIAL PARTNER—ACTION AGAINST—ACTION TO ENFORCE DECREE IN EQUITY.

A decree in a suit in equity, at the instance of a creditor of a firm, found that a special partner had received a sum, the property of the firm, which should have been applied to the payment of debts, and ordered such partner to pay the amount to the clerk of court in order that it might be applied to the payment of the claims that should be established against it. The partner having failed to make payment as required, *held*, that such decree could not be foundation for an action at law at the instance of the creditor to compel him to do so, as it did not entitle the creditor to demand judgment, either in his own right, or as trustee for the other creditors, for the entire sum; and the amount to which he was entitled was not fixed, nor could it be ascertained from the facts found in the decree. *Held, further*, that the action could not be maintained, even though the clerk of court be joined as co-plaintiff, as the decree did not make him a trustee or receiver, nor did it clothe him with any power or right, or convey to him a title to the money as trustee, or otherwise.

Law. Demurrer to petition.

W. J. Knight, for plaintiff.

Henderson, Hurd & Daniels, for defendant.

SHIRAS, J. From the allegations of the petition and amended petition in this cause filed, it appears that Chester C. Corbin brought a suit in equity in the United States circuit court for the Northern district of Illinois, for the benefit of himself and other creditors, against William A. Boies, B. B. Fay, L. W. Conkey, and J. K. Graves, partners under the firm name of Boies, Fay & Conkey, and other defendants, for the purpose, among other things, of setting aside certain judgments and transfers of property, on the ground that the same were in fraud of the rights of creditors. On the twenty-sixth day of September, 1885, a decree was entered in said cause, which, *inter alia*, found that said Graves was a special partner in the firm of Boies, Fay & Conkey, having contributed \$50,000 to the capital stock thereof; that through certain judgments confessed by said firm, and other means recited in the finding of the court, there had come into the hands of said Graves the sum of \$100,796.71, proceeds of the property of the firm, and which equitably belonged to the creditors of said firm; that the complainant, Chester C. Corbin, owns two promissory notes executed by the firm; "and that the said limited partnership is indebted to him thereon in the sum of four thousand three hundred and fifty-nine 31-100 dollars. It is therefore ordered and adjudged and decreed that all the property and effects held by the said limited partnership, on the twentieth day of August, 1882, and subsequent thereto, and when the said judgments were confessed, were a special trust fund for the payment of the firm debts rateably among its creditors. It is further ordered, adjudged, and decreed that the defendant Julius K. Graves pay to the clerk of this court, within 30

days from the entry of this decree, for the benefit of the complainant, Chester C. Corbin, and such other creditors of the said limited partnership as shall prove their right to share in the distribution of the assets of said firm, the sum of \$100,796.71, being the amount of the several sums paid to him out of the assets of the said limited partnership." The decree further provides for a reference to a master to take proofs of the debts due to such creditors of said partnership as shall apply for that purpose, and grants leave to the complainant to apply for further orders, retaining the case for that purpose. The said Graves having failed to pay into court the sum specified in this decree, the said Corbin brought the present action at law in this court against Graves, he being a citizen and resident of Iowa, and, after reciting the rendition of the decree, and the failure to pay to the clerk of the court in Illinois the said sum of \$100,796.71, or any part thereof, he prays judgment therefor, with interest. By an amendment, W. H. Bradley, clerk of said United States circuit court in and for the Northern district of Illinois, is made a co-plaintiff with said Corbin, and unites in the prayer for judgment. By a demurrer interposed to the petition, and amendment thereto, the question is presented whether an action at law can be maintained upon the decree set forth and declared upon in the petition.

Since the decision in the case of *Pennington v. Gibson*, 16 How. 65, the question, whether a final decree in chancery could be made the basis of an action at law, has been settled in the affirmative in the courts of the United States. Decrees in equity are placed upon the same footing as judgments at law. Whether an action at law can be maintained thereon is dependent, not upon the mere fact whether the adjudication is by a court of equity or by a court of law, but upon the question whether the action of the court, evidenced by a decree in equity or judgment at law, is final, and fixes the responsibility of the party proceeded against, so that the amount to be adjudged against him can be ascertained from the record declared on. In *Pennington v. Gibson* the supreme court declared the rule to be "that where the decree of the court of equity cannot be enforced by its own process, and within the regular bounds of its jurisdiction, such decree, when regular and final, and when especially it ascertains and declares the simple pecuniary responsibility of a party, may, and for the purposes of justice must, be the foundation of an action at law against that party whose responsibility has thus been ascertained."

In the case at bar, the objection to the decree sued on is not that it is a decree in equity, but that it does not define the amount of liability on the part of the defendant, Graves, to the complainant Corbin. If the finding was that the defendant was indebted to the complainant in a given sum, there would be no question of the right to maintain an action at law on such a decree. The difficulty lies in the fact that the decree does not establish a liability upon part of

the defendant to complainant for any fixed sum, nor does it find the *data* from which can be determined what sum is due complainant from said Graves. The decree finds that there is due to complainant from the firm of Boies, Fay & Conkey the sum of \$4,359.31, but this does not establish the fact that J. K. Graves is liable for this sum, or any part thereof. The decree finds that he is a special partner, and has contributed \$50,000 to the capital stock of the firm; and it does not appear that he is personally liable for the debts of the firm. The decree finds that said Graves has received of the property of the firm an amount equal to \$100,796.71, which should be applied to the payment of the debts of the firm, and Graves is ordered to pay this sum to the clerk of the court, in order that it may be applied to the payment of the claims that may be established against it. Until the report of the master is made and confirmed, it cannot be known what amount of debts may be proven up under the reference, and, until this is known, it is impossible to ascertain the amount to which the complainant Corbin is entitled out of the amount adjudged to be in the hands of the defendant.

It is absolutely certain that under the findings of the decree he cannot, in any event, be entitled to over \$4,359.31, and interest. Upon the final hearing it may appear that he is entitled to but a fraction of this sum. It is manifest that the decree does not entitle him to demand judgment in his own right for the entire sum of \$100,796.71, and it is equally plain that the amount to which complainant is entitled is not fixed by the decree as it now stands, nor can it be ascertained from the facts found in the decree. When, in the further progress of the case in the Illinois court, it is ascertained what amount of claims are entitled to share in the distribution of the fund, then the proportionate share coming to complainant can be ascertained and decreed; and this amount having been thus ascertained and adjudged against the defendant, and in favor of complainant, may be made the basis of an action at law. As the decree now stands, it is not sufficient to enable the plaintiff to maintain an action at law thereon for the recovery of the specific sum that may be due him; neither does it enable him to maintain an action at law in his own name for the entire sum ordered to be paid into court by said Graves. The decree does not require the defendant to pay the amount named to complainant, nor does it in any way appoint or recognize Corbin as a trustee for the other creditors. The order is that the defendant pay the sum to the clerk of the court.

If this court should now enter a judgment at law in favor of Corbin for the entire sum claimed, this court would have no control over the disposition or distribution of the fund, and the court in Illinois would also be without control over the fund thus collected upon a judgment at law in Iowa, for the reason that this action is not brought under the authority of that court, nor in pursuance of any order made by it. So far as Corbin is concerned, the action is brought *sua sponte*,

and is based upon his own right to sue at law upon the decree; and, as already said, the decree rendered does not adjudge any specific sum to be due to complainant, and hence this court cannot give judgment in favor of Corbin upon the decree as it now stands.

By the amendment filed to the petition William H. Bradley, clerk of the United States circuit court rendering the decree, is made a complainant; and it is urged that by the joinder of parties plaintiff thus brought about the action can be maintained. It is manifest, however, that Bradley has no joint or common interest with Corbin in the subject-matter of the action, and the joinder of the clerk of the court does not avoid the difficulty that the decree does not adjudge any specific sum to be due to Corbin.

The amendment also avers that this action is brought for the benefit of said Corbin, and of all other creditors of the limited partnership who shall prove up their right to share in the distribution of the assets as provided in the decree declared on; and it is urged in argument that a recovery of the entire amount decreed to be paid in by Graves can be had in this action, the same to be distributed by the court in Illinois. This is an action at law, based upon the decree rendered in Illinois, and that decree does not authorize or empower Corbin to act as trustee or receiver for the other creditors, nor does it in any manner authorize him to sue for and recover the \$100,-796.71 ordered to be paid into court. There is lacking, therefore, a right at law on part of Corbin to the entire sum, either in his own right, or as trustee for the other creditors.

It is also urged in argument that the provision of the decree directing Graves to pay the sum named to the clerk of the court constitutes the clerk a trustee for the benefit of the creditors, and that, as such, under the Code of Iowa, § 2544, he can sue at law to recover the amount ordered to be paid. The decree simply ordered Graves to pay the amount named to the clerk of the court. If paid to him, the money would, in effect, be held by the court for distribution. The decree does not make the clerk a trustee or receiver, nor does it clothe him with any power or right, nor does it convey to him a title to the money as trustee, or otherwise. In fact, the decree upon its face shows that one Robert E. Jenkins has been appointed receiver in the cause. It cannot be held that a simple provision in a decree, directing a party to the suit to pay a given sum to the clerk of the court, is in effect an appointment of the clerk as a trustee for the rights of creditors, with authority to go into other jurisdictions, and maintain actions at law for the recovery of the sum ordered to be paid. It is not made to appear that the court in Illinois has in any manner empowered any one to sue for the sums ordered to be paid into that court. To maintain the present action at law it is necessary that the plaintiff shall show that they have a right at law, under the terms of the decree sued on, to recover judgment for some fixed amount against the defendant.

So far as the plaintiff Bradley is concerned, it is not claimed that he has any interest in or right to the fund sought to be recovered, except such as is derived from the order made that Graves should pay the amount named to the clerk of the court. This we hold to be simply an order requiring payment by Graves, and not a decree conferring a right or title upon the clerk as trustee or otherwise. So far as the plaintiff Corbin is concerned, he cannot, under the terms of the present decree, maintain an action at law for the entire sum ordered to be paid by the decree, because he had no legal title thereto; nor has he been empowered to sue therefor in any representative capacity; nor can he take judgment for any specific sum, as his individual share of the common fund, because the amount to which he may be entitled is not ascertained by the decree sued on, that being one of the questions not yet settled by the Illinois court.

The demurrer must therefore be sustained, and it is so ordered.

LOVE, J., concurs.

SMITH and others v. SCHELL and others.

(Circuit Court, S. D. New York. April 9 and 12, 1886.)

1. CUSTOMS DUTIES—PROTEST—SUFFICIENCY.

A protest made in the case of merchandise not enumerated *eo nomine* in the tariff act in force at the time of its importation, and stating only that the same is claimed to be dutiable at a rate of duty which is imposed by such act upon upwards of 250 articles specially enumerated, and also upon all articles "not enumerated" therein, is insufficient, under the protest act of February 26, 1845, (5 St. at Large, 727,) and no recovery can be had thereunder.

2. SAME—CIRCULAR RATE.

A protest made in the case of this merchandise, stating the rate of duty only that it is claimed should be imposed thereon, but especially referring for the grounds of the claim to a treasury circular, in which it was held by the secretary of the treasury that other merchandise therein mentioned was dutiable at that rate as being a manufacture of a certain material enumerated in the tariff act as such manufacture, is to be taken together with such circular as constituting the claimants' entire protest, and is, with such circular, sufficient, under the protest act of 1845, to entitle them to recover, if they prove that the merchandise covered by the protest is such manufacture.

2. SAME—DISTINCTION MADE BY COURT.

But if this merchandise is shown to be a manufacture of a material bearing another name than the material of which the manufacture named in the protest is composed, and the tariff act makes a clear and positive distinction between these materials by imposing thereon *eo nomine* different rates of duty, the court, in considering the tariff act, will make the same distinction, although the name of the second material is the name of the genus, and the name of the first is the name of a species thereof; and the claimants are not entitled to recover.

During August and September, 1857, one Henry Hooman imported from Dundee and Glasgow, in Scotland, into the port of New York, certain carpeting, and entered the same for warehouse as

"hemp carpeting." Subsequently, and while in warehouse, Hooman transferred this carpeting to the firm of Haggerty & Co., the surviving partner of which is the plaintiff's testator. The defendant's testator, the late Augustus Schell, classified this carpeting as "jute carpeting," dutiable at 24 per centum *ad valorem*, under the provision for "carpets, carpeting, hearth-rugs, bedsides, and other portions of carpeting, being either Aubusson, Brussels, ingrain, Saxony, Turkey, Venetian, Wilton, or any other similar fabric," contained in Schedule C of the act of July 30, 1846, (9 St. at Large, 42,) as amended by the act of March 3, 1857, (11 St. at Large, 192.)

Pursuant to the act of February 26, 1845, (5 St. at Large, 727,) Hooman, at the time he entered the carpeting for warehouse, made protests as follows:

"I hereby protest against the payment of twenty-four per cent. duty charged on the annexed entry of hemp carpeting, claiming that under the tariff act of March 3, 1857, the same are only subject and liable to the duty of fifteen per cent. I claim to have the difference refunded, only paying the amount to obtain possession of the goods."

Subsequently, and on March 17, 1858, Haggerty & Co., pursuant to the same act, made protests as follows:

"We hereby protest against the payment of twenty-four per cent. duty charged on the annexed entry of hemp carpeting, claiming that especially under the recent decision of the honorable secretary of the treasury, and by the circular issued by him relating to the duty on hemp carpeting, the same are only subject and liable to pay a duty of 15 per cent. *ad valorem*. We make this additional protest in view of these facts, and claim to have the difference refunded, only paying the amount to obtain possession of the goods."

The decision and circular of the secretary referred to by Haggerty & Co. in this protest read as follows:

"TREASURY DEPARTMENT, March 1, 1858.

"SIR: Messrs. Wyman and Acklay have appealed to this department from the decision of the collector at Boston, assessing duty on an article invoiced as 'Dutch carpeting' at the rate of 24 per cent., under the classification in Schedule C of the tariff of 1857, of 'carpets, carpeting, hearth-rugs, bedsides, and other portions of carpeting, being either Aubusson, Brussels, ingrain, Saxony, Turkey, Venetian, Wilton, or any other similar fabric.' The appellants contend that the article in question, being manufactured of hemp, should be charged with duty at the rate of 15 per cent., under the classification in Schedule E of the tariff of 1857, of 'manufactures of hemp not otherwise provided for.' 'Dutch carpeting' is a fabric differing from some one or more of the descriptions of carpets specially named in Schedule C only in the material of which it is composed, the former being of hemp and the latter of wool; and the question is presented whether carpeting composed of hemp can be regarded as a fabric 'similar' to the enumerated varieties, within the meaning of the law. The department is of opinion that that term has reference as well to the material of which the fabric is composed, as to the mode of manufacture or the use for which it is designed, and that the article in question should be charged with duty at the rate of 15 per cent., under the

classification of Schedule E of 'manufactures of hemp not otherwise provided for.' The decision of the collector is therefore overruled.

"Very respectfully,

"HOWELL COBB, Secretary of the Treasury.

"A. W. Austin, Esq., Collector, Boston, Mass."

Thereafter Haggerty & Co. withdrew the carpeting in suit from warehouse for consumption, paid duty thereon at the rate of 24 per centum *ad valorem*, and brought this suit to recover the excess of duties exacted above 15 per centum *ad valorem*.

In Schedule E of the tariff act of 1846, as amended by that of 1857, are upwards of 250 specially enumerated articles, each dutiable at 15 per centum *ad valorem*. Section 1 of the act of 1857 imposed a duty of 15 per centum *ad valorem* upon all articles "not enumerated" in either of these acts. Schedule D of the act of 1846, as amended, imposed a duty of 19 per centum *ad valorem* on "jute, sisal grass, coir, and other vegetable substances, unmanufactured, not otherwise provided for," and on "matting, China, and other floor-matting, and mats made of flags, jute, or grass." Schedule C imposed a duty of 24 per centum *ad valorem* on "hemp unmanufactured;" and, as already stated, Schedule E a duty of 15 per centum on "*manufactures of hemp not otherwise provided for*," and Schedule C a duty of 24 per centum on "carpets, carpeting," etc.; but in neither of these acts is "*hemp carpeting*" or "*jute carpeting*" provided for *eo nomine*. (Hemp and jute are also treated as separate articles in the following named tariff acts: Section 3 of the act of August 30, 1842; sections 14 and 15 of the act of March 2, 1861; sections 10 and 11 of the act of July 14, 1862; section 7 of the act of June 30, 1864; section 21 of the act of July 14, 1870; Schedule C, section 2504, Rev. St.; Schedule J of the act of March 3, 1883.)

Upon the trial, when the plaintiffs offered in evidence the protests made by Hooman, the defendants objected to their admission on the ground that they did not comply with the requirement of the protest act of 1845 for the following reasons: (1) These protests do not point out (and did not point out to the collector) the precise error of fact or law which it is now claimed rendered his exaction of duty unauthorized. (2) They do not refer in terms to any article or the name of any article, specially or generally, in either of the tariff acts of 1846 or 1857, or in any way to the provision for non-enumerated articles contained in the latter act; "*hemp carpeting*" not being mentioned *eo nomine* in either of these acts. (3) The only particular of fact or law pointed out in them is that under the tariff act in force the carpeting in suit is "only subject and liable to the duty of fifteen per cent." Schedule E of the act of 1846, as amended by that of 1857, contains upwards of 250 articles, and imposed a duty of 15 per centum *ad valorem* on each of them. Section 1 of the act of 1857 also imposed a duty of 15 per centum *ad valorem* on articles "not enumerated" in either act. These protests do not point out or

specify whether it is claimed that the carpeting in question was dutiable under Schedule E of the first act, or section 1 of the second act. (4) The protest act of 1845 did not require a collector to search through a list of 250 articles or more to ascertain whether these protests could possibly be made to apply under Schedule E; and, if not, then to search through all the other parts of the tariff acts of 1846 and 1857 to ascertain whether they could possibly be made to apply under the provision for non-enumerated articles of the latter act. The protest act of 1845 made it the duty of the claimant to set forth distinctly and specifically the grounds of his objection to the collector's classification of the merchandise in question, and his exaction of duty thereon.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Ass't U. S. Atty., for defendants, cited *Davies v. Arthur*, 13 Blatchf. 34; S. C. 96 U. S. 148, and cases therein cited.

A. W. Griswold, for plaintiff, cited *Arthur v. Morgan*, 112 U. S. 495; S. C. 5 Sup. Ct. Rep. 241; *Steegman v. Maxwell*, 3 Blatchf. 365; *Stone v. Redfield*, decided November 25, 1861, by NELSON, J.; *Vaccori v. Maxwell*, 3 Blatchf. 368.

COXE, J., (*orally*.) There is no escape from the conclusion that this protest is insufficient. The statute provides that a person who feels himself aggrieved must, by his protest, point out clearly and specifically the grounds of his objection. The importer of the carpeting in suit protests against paying the duties charged by the collector, insisting that under the tariff act of 1857 his importations are only subject to a duty of 15 per cent. *ad valorem*. This is simply referring the collector to the tariff act of 1857. The protest does not point out to the section or the clause upon which the importer relies. There are, in that act, two sections under which the importations in question might be assessed at the rate of 15 per cent., and the plaintiffs are, even now, unprepared to say upon which they will finally rest their case. The collector is referred to neither. The protest leaves everything to speculation and conjecture. The collector is informed that he has made a mistake, but is left without the slightest information by which to correct it. The law requires more than this of the importer. The defendants' objection is therefore sustained, and the protests made by Hooman are excluded.

The defendants' counsel made the same objection to the admission in evidence of the protests made by Haggerty & Co. as was taken to the Hooman protests; but the court held that the secretary's circular of March 1, 1858, to which these protests refer, must be taken as a part of them, and that consequently it is evident that the grounds of objection taken to the payment of duty at 24 per centum *ad valorem* by Haggerty & Co. in their protests are that the carpeting in suit is dutiable at 15 per centum *ad valorem*, under the provision for

"manufactures of hemp" contained in Schedule E of the act of 1846 as amended. The court thereupon overruled defendants' objection, and admitted in evidence Haggerty & Co.'s protests.

The plaintiffs then produced two witnesses to show that "hemp carpeting," or "jute carpeting," as it was sometimes called, was made in 1857, and as far back as 1846, of one article commercially known as "jute," and never of anything else; that jute is the fibre of a plant called "jute," and hemp the fibre of a plant called "hemp;" that in both cases this fibre is the inner bark of the plant; that there is as much difference, possibly more difference, between jute and some species of hemp than there is between one species of hemp and another; that jute is less woody than hemp, and softer, if by "woody," "stiffness" is meant; that jute is a product of India, and hemp of Russia, Sweden and Norway, Italy, India, and other countries; that jute is cheaper than hemp, and in fact the cheapest article grown or produced that could be put into a carpet or carpeting; that originally hemp was used in Dundee, Scotland, and in England; that subsequently jute was introduced, and was and is now used as a substitute for it; that jute and hemp are sometimes mixed in manufacturing; that "hemp carpeting" is a species of carpet or carpeting which, like ordinary carpets or carpeting, is spread on the entire floor, or in strips, as the purchaser may fancy. One of these witnesses testified that jute is a species of hemp. But it did not appear, however, from the testimony of either of these witnesses, that jute was ever commercially known in 1846 or in 1857, or at any time between these years, as a species of hemp. Plaintiff also read the definition of "hemp" as given at page 64 of volume 11 of the Encyclopædia Britannica and in Ures' Dictionary of Arts, Manufactures, etc.; and section 13 of the tariff act of 1861, and section 9 of the act of 1862, as to hemp and jute carpeting.

The plaintiffs having rested, the defendants' counsel moved the court to direct a verdict in their favor on the ground that plaintiffs had not proven facts sufficient to constitute a cause of action.

Defendants' Counsel. The merchandise in suit has not been proven to be a manufacture of hemp, and upon plaintiffs' theory of the case, before they are entitled to recover, such proof must be made. Under Schedule C of the tariff act of 1846, as amended by that of 1857, "hemp unmanufactured" was subject to a duty of 24 per centum *ad valorem*; under Schedule D "jute, sisal grass, coir, and other vegetable substances, unmanufactured, not otherwise provided for," and "matting, China and other floor-matting, and mats made of flags, jute, or grass, were subject to a duty of 19 per centum *ad valorem*; and, under Schedule E, "manufactures of hemp not otherwise provided for," to a duty of 15 per centum *ad valorem*. It thus appears that congress has in these acts made a clear and positive distinction between jute and hemp. As congress has made this distinction, this court is bound, in considering these acts, to make the same distinc-

tion. The undisputed testimony in this case shows that at and prior to the dates of the passage of these acts "hemp carpeting" was made of jute. Within the purview of these acts, it is not a manufacture of hemp. But it matters not whether hemp carpeting was made of hemp or of jute; the merchandise in suit was carpeting, and was therefore properly classified for duty under the provision for carpeting contained in Schedule C. If further reason for this classification be needed, it is found in the fact that no evidence has been produced by the plaintiffs to show of what material or materials this merchandise was composed.

Plaintiffs' Counsel. No inference must be drawn to the damage or detriment of the plaintiffs by reason of the difference between unmanufactured hemp and unmanufactured jute; because, at the very time of the passage of the act of 1857, congress had made several appropriations for the encouragement of the manufactures of what is known as "Russian hemp," or hemp proper, and contracts were made by direction of congress for the purchase of American hemp in place of this foreign hemp, for the uses then made of it. The whole question in this case is, was this hemp which was called by the importer "hemp carpeting," and which was returned by the appraiser as jute carpeting, manufactured hemp? And that all turns upon the question whether or not jute is a species of hemp. If jute is a species of hemp, then the plaintiffs' carpeting is a manufacture of hemp, and he is entitled to a verdict. That is all there is to it. The plaintiffs insist that there has been evidence enough offered in this case to go to the jury upon the question whether or not jute is a species of hemp. He has the testimony of one of his witnesses upon that question, and he has the authorities in two books that jute is a species of hemp.

THE COURT, (*orally.*) I think the counsel for the defendants states the controversy in this case perfectly. The burden is upon the plaintiffs to satisfy the jury that these importations are manufactures of hemp. Unless the plaintiffs succeed in doing so, they are not entitled to recover. Instead of proving that their importations are manufactures of hemp, they have proved beyond any question that they are manufactures of jute. They have, it is true, supplemented this evidence by the opinions of learned gentlemen, taken from various periodicals, that hemp and jute are substantially the same thing, and it is insisted that the proof is sufficient to uphold a finding by the jury to this effect. But the short answer, in my judgment, is that we are construing the tariff acts of 1846 and 1857, where the law-makers have drawn a clear distinction between the two materials. So I do not see how I can leave it to the jury as a question of fact to say whether the two are the same, when congress has said that they are different. Congress, throughout the law, has recognized the distinction between "jute" and "hemp." The two words are repeatedly

used, and duties are imposed upon manufactures of each respectively.

As there is no question of fact, gentlemen, you will render a verdict in favor of the defendants.

Such verdict was thereupon rendered.

CUMMINS and others v. ROBERTSON, Collector.

(Circuit Court, S. D. New York. April 20, 1886.)

CUSTOMS DUTIES—PROTEST—REV. ST. § 2931.

A protest, under section 2931, Rev. St., stating the rate of duty which imported merchandise should pay, and not specifying under what section, schedule, clause, or paragraph of the tariff act, or under what name in said act, the same is claimed to be dutiable, is invalid and insufficient, where there is more than one clause or paragraph in said act imposing the same rate of duty, and where the imported merchandise is not specifically designated in said act by the same name as that stated in the protest.

This was an action against William H. Robertson, collector of the port of New York, to recover an alleged excess of duties upon certain importations of bichromate of soda, made by the plaintiffs in the years 1884 and 1885. The collector assessed the duty thereon at three cents per pound, under the provision for bichromate of potash contained in Schedule A of tariff act of March 3, 1883, (22 St. at Large, 488; section 2499, Rev. St.)

The plaintiffs protested under section 2931, Rev. St., as follows:

"We hereby protest against the liquidation of the duties as made by you upon our entry of bichromate of soda, per steam-ship Noordland, from Antwerp, dated December 27, 1884, and against the payment of the duties as assessed, demanded, and exacted by you thereon. The grounds of our objection are that bichromate of soda should pay a duty of 25 per cent., not 3 cts. per lb., as assessed by you. We also protest against the payment of any and all duties not legally chargeable upon said importation, and hereby especially reserve all questions of law or fact that may arise. Being under compulsion and duress, we pay the amount of duties demanded and exacted by you in order to obtain possession of our goods, and hereby notify you that we shall hold yourself and the United States jointly and severally liable for the excess exacted, and also notify you that we intend this protest to apply to all future similar exactions.

"Dated New York, February 16, 1885."

The plaintiffs' attorneys, in opening the case, claimed that the imported merchandise was dutiable at 25 per cent. *ad valorem* as a chemical salt, under Schedule A of tariff act of March 3, 1883, under the provision for "all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act." The case turned upon the sufficiency of the protest, on the objection of the defendant to its reception in evidence when offered at the trial by the plaintiffs.

The objections to the protest made by the defendant were: (1) That it does not comply with the requirements of section 2931, Rev. St., in that it does not set forth distinctly and specifically the grounds of the plaintiffs' objection to the duties levied on their merchandise by the collector. (2) It does not refer in terms to any tariff act, nor to any section, schedule, clause or paragraph of any tariff act, nor to the name of any article or merchandise of commerce, specially or generally, under which the plaintiffs claim the goods should be dutiable. (3) Bichromate of soda, *eo nomine*, is not specified in any tariff act. The protest does not state that bichromate of soda should pay a duty of 25 per cent. as a chemical compound, or chemical salt, (as now claimed by plaintiffs,) nor does it refer the collector in any manner to Schedule A of the tariff act of 1883. (4) Paragraphs (Heyl) 6, 29, 39, 87, 88, 92, 93, 124, 185, 206, 283, 384, 392, 398, 401, 407, 422, 427, 429, 455, 458, 459, 469, and 486 of the tariff act of 1883, each and all, impose a duty of 25 per cent. *ad valorem*. The protest does not point out to the collector under which of such paragraphs the plaintiffs claim their goods to be dutiable. (5) The invoices and entries throw no light upon, and furnish no guide to, the classification of the goods. The merchandise is mentioned therein simply as casks or barrels of bichromate of soda.

The United States district attorney quoted *Sadler v. Maxwell*, 3 Blatchf. 134, 135; *Davies v. Arthur*, 13 Blatchf. 34; 96 U. S. 148; also *Smith v. Schell*, *ante*, 648.

Plaintiffs' attorneys quoted *Frazee v. Moffitt*, 18 Fed. Rep. 584.

Dudley J. Phelps and *Edward Hartley*, for plaintiffs.

Stephen A. Walker, U. S. Dist. Atty., and *Henry C. Platt*, Asst. U. S. Dist. Atty., for defendant.

COXE, J., (*orally*.) I am clearly of the opinion that this protest is insufficient. To hold it valid, the court, in my judgment, would have to disregard the plain language of the statute which requires the importer to point out distinctly and specifically the grounds of his objection. This protest does nothing of the kind. Bichromate of soda is a non-enumerated article, and no section of the statute is referred to under which the importer insists that the duty should be collected. The protest does not state that the importation is a chemical salt. The section of the tariff act of March 3, 1883, providing for an *ad valorem* duty of 25 per cent. upon "all chemical compounds and salts" is in no way alluded to. In short, there is nothing stated in the protest to aid the collector in making a correct classification. No guide is given him. He is simply referred to the statute, and requested to search through its manifold provisions for the purpose of proving himself in error. He is informed that he has made a mistake, and is told that he may find it if he examines the statute with sufficient diligence. The law relating to protests contemplates much more than this.

The case of *Frazee v. Moffitt*, 18 Fed. Rep. 584, is not an authority in point, for in that case there was but one section of the statute under which the liquidation could have been made, and, with that section and the protest before him, the collector could not have been misled. In the case at bar, on the contrary, there are a large number of clauses, stated by the district attorney to be about 24, which provide for an *ad valorem* duty of 25 per cent. There is nothing in the protest calling the attention of the collector to the one upon which the importer relied.

The objections to the admission of the protest are sustained.

The protest being excluded, the district attorney moved for a direction of a verdict for the defendant, which motion was granted by the court.

HOBBIIE and others v. SMITH and others.¹

SAME v. MICHIGAN PIPE Co.

(Circuit Court, N. D. New York. May 10, 1886.)

1. PATENTS FOR INVENTIONS — ASSIGNMENT, RESERVATION IN — ACTION BY ASSIGNEE FOR INFRINGEMENT.

Where the owner of a patent assigns for certain states, but reserves to himself the right to use the invention in one of said states in common with his assignee, such reservation will not defeat an action by the assignee alone for an infringement of the patent in the states not covered by the reservation.

2. SAME—CONSTRUCTION OF ASSIGNMENT.

But it would not be an unreasonable construction of such an assignment to say that the patentee, having, by the usual words of transfer, divested himself of all right, title, and interest in the patent, desired to provide that he should be permitted to use the patent in the territory covered by the reservation without subjecting himself to an action for infringement.

3. SAME—DEFENSE THAT TITLE IS DEFECTIVE MUST BE PLEADED.

Where alleged defects of title might have been corrected had plaintiff been notified prior to the trial, *held* that, under the provisions of the New York Code, it was the duty of the defendants to apprise the plaintiffs, either by demurrer or answer, of this defense.

4. SAME—ATTACKING PATENT.

An attack on the validity of a patent comes with poor grace from one who has paid large sums of money for its privileges, and built up a flourishing business by asserting that his goods were made under it, and who has maintained that it was good and valid in law, even though when sued as a trespasser he may not be technically estopped to dispute its validity.

5. SAME—EFFECT OF ACQUIESCENCE BY PUBLIC.

In such a case, and where, although the invention was of great value, there was a full acquiescence on the part of the public in the validity of the patent, the court should scrutinize evidence against its validity with the utmost care.

6. SAME—PATENTABLE NOVELTY.

The patent was for a wooden pipe, which was rendered impervious to water or gas by coating it inside and out with a composition of coal-tar and sawdust. It was shown that pitch was known as a preservative of wood long prior to the date of the patent; that it had been used as a coating for wooden

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

pipes; that tarred pipes rolled in sand were old; and that sawdust had been known as an absorbent of sticky substances. But sawdust and tar had never before been combined in the manner described in the patent, and the patentee made tarred wooden pipe a practical reality. *Held*, that although patentee's method was not a great discovery, it was a valuable improvement, entitling him to the reward of an inventor.

7. SAME—INFRINGEMENT.

The specification described the coating of wooden pipes with a composition of coal tar mixed with sawdust, and applied while hot, and suggested that "the pipes, after having been coated with tar, and before the said tar has set, may be rolled in sawdust." The claim was for "the combination of a composition of hard boiled tar and sawdust with wooden pipes, applied in the manner and for the purpose set forth." *Held* that, referring to the description for a full meaning of the claim, the patent was not limited to the coating of the pipes with the composition, but covered the method of coating them with tar, and then rolling them in sawdust.

8. SAME—EQUIVALENTS.

The defendants in this case used auger borings instead of sawdust in coating their pipes. The two were so nearly identical that the difference was hardly discernible, one being an exact equivalent of the other. *Held*, that they infringed.

9. SAME—SALE OF PATENTED ARTICLE, VENUE OF.

Defendant manufactured patented goods in Michigan, for which state they owned the patent. Some of their goods they sold and delivered within their own territory, the purchaser taking them into the territory owned by plaintiffs under the same patent. In other instances they sold goods which they agreed to deliver within plaintiffs' territory. *Held: First*, that where the delivery of the goods was made in Michigan, the venue of the sale was there; *second*, that where, by express agreement, the defendants contracted to convey the goods to plaintiffs' territory, and there deliver them, the sale must be regarded as made in said territory, and that such sales were an infringement upon plaintiffs' exclusive rights.

10. SAME—LAWFUL WHERE MADE, LAWFUL EVERYWHERE.

The grantee of a particular territory under a patent, has the right to sell in that territory, and such right cannot be curtailed, though the purchaser take the goods beyond the prescribed limits; and this is so, even though the vendor knows that the purchaser intends so to act.

11. SAME—DAMAGES—LOSS OF SALES.

The evidence showed that the sales made by defendants in plaintiffs' territory would have been made by plaintiffs if defendants had not interfered, and that plaintiffs were compelled to sell their goods at a reduced price by reason of the defendants' competition. *Held*, that the profits which plaintiffs would have realized, had they made the sales, were a fair measure of damages; and that the reduction in plaintiffs' price caused by defendants' unlawful sales should also be taken into consideration.

At Law. Tried by the court.

James A. Allen and George Wing, for plaintiffs.

Benjamin H. Williams and Wells W. Leggett, for defendants.

COXE, J. On the twenty-second of November, 1864, letters patent No. 45,201 were issued to Arcalous Wyckoff, of Elmira, New York, for an improvement in gas and water pipes. In the specification the patentee declares:

"This invention consists in the application or use of a composition of sawdust and hard boiled tar in combination with wooden pipes, in such a manner that, by coating said pipes on the inside and outside with the composition, the wood is rendered perfectly impervious to water or gas, and preserved against the injurious influence of moisture from inside or outside. * * * I boil coal or gas tar to such a consistency that it will become hard when cooled,

and mix it with sawdust in about the following proportions: coal-tar ten parts, sawdust one part; and this composition, while hot, I apply to the pipes,—both inside and out for gas, and outside only for water. Instead of mixing the coal-tar with sawdust previous to applying the composition to the pipes, the coal-tar, after having been boiled, may be applied first, and the sawdust sprinkled over it; or, instead of this, the pipes, after having been coated with tar, and before the said tar is set, may be rolled in sawdust to take up enough to prevent the pipes from sticking together when piled up, or to the hands when handled, before the composition is perfectly hard."

The claim is as follows:

"The combination of a composition of hard boiled tar and sawdust with wooden pipes, applied in the manner and for the purpose set forth."

Plaintiffs were, from May 31, 1876, until November 22, 1881, the date of its expiration, assignees under the patent for New York, New England, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia. During the latter part of this period the defendants, first as copartners, and afterwards, with some changes, as a corporation, were assignees for Michigan and other states, having the right to make, use, and sell the patented article within the assigned territory. The defendants have sold large quantities of the patented pipe to parties residing within the territory assigned to the plaintiffs, and it is to recover damages for this alleged infringement that these actions are brought.

The defenses are—*First*, that the plaintiffs' title is defective; *second*, that the patent is void for want of novelty and invention; *third*, that defendants do not infringe, because the pipe manufactured by them is not covered by the claim of the patent; and also for the reason that all their sales were made at Bay City, Michigan, where they had a right to sell.

The objections urged against plaintiffs' title, though they show much ingenuity, are formal and technical in character. It is said that the patentee is a necessary party for the reason that the assignment from him dated July 31, 1874, contains these words: "Excepting and reserving, however, the right of said Archalous Wyckoff to use said patents in common with said I. S. Hobbie, Miles Ayrault, and J. A. Hobbie in the state of New York from and after April 1, 1877." It will be seen that even if the interpretation contended for by the defendants is placed upon this clause, namely, that the patentee still retains the legal title, it could not defeat the action, for the reason that the reservation relates only to the state of New York. As to the other states the assignment is absolute and perfect. But it would seem to be not an unreasonable construction to say that the patentee having, by the usual words of transfer, divested himself of all right, title, and interest in the patent, desired to provide that, after a certain date, and in a limited field, he should be permitted to use the patent without subjecting himself to an action for infringement. The legal title is transferred to the assignees; a personal right to use is retained by the assignor. The answer is silent as to

this objection, and also as to the other alleged defects of title, many, if not all, of which could have been corrected had the plaintiffs been notified prior to the trial. I am inclined to think, therefore, that, under the provisions of the state Code, it was the duty of the defendants to apprise the plaintiffs, either by demurrer or in the answer, of their position in this regard.

Although the defendants, sued as they are as trespassers, may not be estopped to dispute the validity of the patent, it is thought that the accusations against it come with poor grace from those who were willing to pay large sums of money to be admitted to its privileges; who have built up a flourishing business, and made large gains, by asserting that the pipe manufactured by them was made pursuant to its specifications; and who, during its life, maintained, both indirectly and by positive assurance, that it was good and valid in law. These considerations, together with the significant fact that there was a full acquiescence on the part of the public,—that although the patent was regarded as of great value, no one ever disputed its validity,—should lead the court, in an action of this character, to scrutinize with the utmost care the evidence now offered to overthrow it. The defendants presented some proof tending to show that the patented pipe was used prior to the date of the patent at Elmira, Corning, and other places in the southern part of the state of New York. The burden is upon them to establish this defense beyond a reasonable doubt. *Cantrell v. Wallick*, 6 Sup. Ct. Rep. 970, (April 12, 1886,) and cases there cited. It suffices to say that, tested by this rule, the proof is insufficient to overthrow the presumption of validity arising from the patent itself.

The further testimony upon this branch of the case may be summarized as follows. It was shown that pitch was known as a preservative of wood long prior to the date of the patent; that it had been used as a coating for wooden pipes; that tarred pipes, rolled in sand, were known as early as 1851; and that sawdust had been known as an absorbent of sticky substances. The field was therefore a narrow one; but the fact remains that sawdust and tar had never before been combined in the manner described in the patent. Wyck-off took a forward step in the path of invention. He made tarred wooden pipe a practical reality. His was not a great discovery, but it was a valuable improvement, entitling him to the rewards of an inventor.

The proposition that the defendants do not infringe because the method adopted by them of rolling the tarred pipes in sawdust is not covered by the patent, cannot be maintained. It is argued that the claim relates only to the coating of pipe with the composition or mixture of hard boiled tar and sawdust. Such a construction would be illiberal and narrow in any case, and especially so when demanded by those who have for years asserted that their pipe was made pursuant to the specification, and protected by the claim, of the patent.

The claim is for "the combination of a composition of hard boiled tar and sawdust with wooden pipes, applied in the manner and for the purpose set forth." Referring to the description for a full meaning of the claim, (*Reed v. Chase*, 25 Fed. Rep. 94, 99,) it will be seen that "the pipes, after having been coated with tar, and before the said tar has set, may be rolled in sawdust." This is precisely what the defendants do. The claim, fairly construed, covers this manner of applying the tar and sawdust to the pipes. Neither can the defendants escape the charge of infringement because they use auger borings instead of sawdust. The proof is clear that the two are so nearly identical that the difference is hardly discernible. Surely, one is an exact equivalent for the other.

But the most difficult question involved in this controversy remains to be answered. Were the sales made in Michigan, and had the defendants a right to make them there, knowing that the pipe was to be used in the plaintiffs' territory? The defendants were engaged in business at Bay City, Michigan, having their manufactory at that place. The plaintiffs' manufactory was at Tonawanda, New York. The defendants knew this, and also that the plaintiffs' territory embraced New York, New England, and other states. As to some of the larger transactions, it cannot be disputed that the agreement for the sale was made at Bay City, and that the delivery upon the cars or boat at that place was a delivery to the purchaser. In no two instances were the transactions precisely similar; but it may be said, generally, that, in those cases where the parties had not already a full knowledge of the subject by reason of previous dealings, the first step was an inquiry from the purchaser as to the quality of the pipe, the price, the rate of freight, etc. This was followed by a letter from the defendants inclosing a price-list, and stating the proposed discount. Then followed an order for the pipe or casing. The order was accepted, and the merchandise loaded upon the cars or boat at Bay City. It was paid for by check or draft mailed to the defendants. In some instances the agreement was that the pipe should be delivered to the purchaser at Tonawanda, Buffalo, or other places in plaintiffs' territory. In the case of the sale to Richard Savage, the defendants agreed, in writing, to deliver the property at Wheeling, West Virginia, and Savage wrote from Wheeling accepting the offer; so that, not only was the contract made at Wheeling, but the pipe was delivered there. Regarding the sales made to Garden City and to the Springfield Gas-light Company, the defendants agreed to fill the order for "\$20 per M. feet, delivered at Tonawanda or Buffalo." The defendants paid the freight to Buffalo, or deducted it from their bill. As to the Ocean Oil Company, the agreement was to deliver in New York at one dollar per lineal foot. Regarding the order of the Auburn Steam-heating Company, dated July 19, 1879, I cannot find that the proposition therein contained was accepted by the defendants. Although some of the correspondence is almost illegible, it would seem

that the final agreement was that the property should be delivered at Bay City, the defendants acting for the purchaser only to procure a favorable freight rate through to Auburn. Where the pipe or casing was delivered to the carrier at Bay City for and on account of the vendee, there was a sale with no conditions. The minds of the parties met at Bay City, and the transaction was completed there. Nothing more was required. The title passed when the goods were delivered to the carrier. The carrier was the agent of the vendee, and not of the defendants. Where a contract is made for the purchase of goods, and nothing remains to be done by the vendor, the property passes immediately, so as to cast upon the vendee all future risks. Had there been a condition precedent to be performed in the plaintiffs' territory, the rule would be otherwise. The case in hand differs in this respect from the case of *State v. O'Neil*, 2 Atl. Rep. 586. There the goods were sent C. O. D. from New York to Vermont. The express company was made the agent of the vendor, and the vendees acquired no right to the property until they paid for it; precisely, in legal effect, as if the vendor had sent his clerk or had himself carried the goods into Vermont, and had there delivered them upon receiving the price. The distinction between such a transaction and the sales of pipe, where the delivery was made at Bay City, is clearly drawn in *U. S. v. Shriver*, 23 Fed. Rep. 134, where the court, at page 136, says:

"An order from a person at Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield C. O. D., is a mere offer, by the persons sending such order, to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor, under such an order, was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser,—the sale would be the sale at Shawneetown; and if it were lost or destroyed in transit, the loss would fall upon the purchaser."

The delivery to the carrier is a constructive delivery to the vendee, and the goods are considered in his possession when delivered to the carrier for him, and at his risk; but if not delivered for him,—if delivered for the vendor; if by the express terms of the contract the vendee has nothing to do with the carriage of the property; if he is under no obligation regarding the goods until they are delivered,—it follows that the sale is not completed till they are delivered and accepted. When goods are sent upon the account and risk of the shipper, the delivery to the carrier is a delivery to him as agent of the shipper, and not of the consignee. *Shuenfeldt v. Junkermann*,

20 Fed. Rep. 357; *Grove v. Brien*, 8 How. 429; *Terry v. Wheeler*, 25 N. Y. 520, 525; *Olyphant v. Baker*, 5 Denio, 379, 382; *The Mer-rimack*, 8 Cranch, 317; *Acraman v. Morrice*, 8 C. B. 449; *Ludlow v. Bowne*, 1 Johns. 1; *Evans v. Marlett*, 1 Ld. Raym. 271; *Vale v. Bayle*, 1 Cowp. 294; *Thompson v. Cincinnati, W. & Z. R. Co.*, 1 Bond, 152; *Blum v. The Caddo*, 1 Woods, 64; *Andrews v. Durant*, 11 N. Y. 35; *Mucklow v. Mangles*, 1 Taunt. 318; *The Frances*, 8 Cranch, 418; *Jones v. U. S.*, 96 U. S. 24; *Benj. Sales*, §§ 317-320; *Story, Sales*, § 306.

These authorities establish two propositions as applicable to the cause in hand: *First*, that where the delivery of the goods was made at Bay City, the venue of the sale must be held to be in Michigan; and, *secondly*, where, by express agreement, the defendants contracted to convey the property to New York, Massachusetts, and West Virginia and there deliver it, the sale must be regarded as consummated in the plaintiffs' territory. For this infringement there can be little doubt as to the plaintiffs' right to recover.

Regarding the remaining sales, the question is, can there be a recovery for pipe and casing sold at Bay City, the defendants knowing that it was to be used in the plaintiffs' territory? Upon this proposition there may be room for discussion as to what the law should be; there can be none as to what the law is. In *Adams v. Burke*, 17 Wall. 453, (at circuit, 1 Holmes, 40,) the question was sharply at issue, and the supreme court decided that a patented article, when rightfully bought, could thereafter be used anywhere; thus going a step further than is necessary in the case at bar; for here the action is not against the user, but against the seller, there being no pretense that the defendants ever used the pipe in the forbidden territory. Had the plaintiff in that case brought his action against Lockhart and Seelye, the merchants who sold the coffin lid in Boston, it is quite clear that there would have been no dissent in the supreme court. No case has been cited holding that the grantee of a particular territory is not at liberty to sell within that territory, and, having the right, it cannot be curtailed, though the purchaser takes the goods beyond the prescribed limits. This is so, even though the vendor knows that the purchaser intends so to act. See, also, *McKay v. Wooster*, 2 Sawy. 373. *Hatch v. Adams*, 22 Fed. Rep. 434, is an authority only for the proposition that the purchaser of patented articles from the grantee of an exclusive territorial right is not at liberty to bring them into the territory of another grantee, and there sell them in the course of trade.

Upon the question of damages, the rule contended for by the plaintiffs is that they are entitled to recover what they would have made had it not been for the defendants' unlawful action. Although stated largely from memory, it is thought that the evidence sufficiently establishes the fact that as to each of the sales made in their territory the plaintiffs would have received the orders had not the defendants

interfered. In some instances the negotiations were actually pending, and the contract about to be awarded the plaintiffs, when the defendants appeared and underbid them. The plaintiffs were also compelled, where they did furnish the pipe or casing, to sell at a greatly reduced price by reason of this competition; as in the Garden City order, for instance. The profits which they would have realized had they made the sales are therefore a fair measure of their damages; and if they were compelled to reduce their price by reason of unlawful sales by the defendants, that also should be taken into consideration.

It follows that the plaintiffs are entitled to recover \$3,825 in the suit against Henry B. Smith and others, and \$925 in the suit against the Michigan Pipe Company, with costs.

AMERICAN BELL TELEPHONE Co. and others v. NATIONAL IMPROVED TELEPHONE Co. and others.¹

(Circuit Court, E. D. Louisiana. May 31, 1886.)

1. PATENTS FOR INVENTIONS—TEMPORARY INJUNCTION—PRIOR DECISIONS.

Where patents have been the subject of judicial investigation, ending in decisions in the circuit courts of the United States maintaining their validity, so far as the issues presented in those causes have been identical with those involved in the case at bar, for the purposes of granting a preliminary injunction to run *pendente lite*, those prior decisions, elsewhere obtained, are sufficient.

2. ESTOPPEL—RES ADJUDICATA—WHO ARE BOUND, AND WHO NOT BOUND.

Parties who are bound by a judgment include all who are directly interested in the subject-matter, and had a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having these rights, substantially, are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of these rights, are equally concluded by the proceedings. *Robbins v. Chicago*, 4 Wall. 657, followed.

3. PATENTS FOR INVENTIONS—THE BELL TELEPHONE PATENT.

The court having reached the conclusion that the invention of Bell is set forth in the claim and specifications as originally filed, therefore any inquiry into the question whether, after the filing of Bell's application, his specifications and claims were changed in consequence of information derived through the examiner of the patent office from the *caveat* of Elisha Gray, would lead to nothing which could affect the validity of the patent. It is also found that Bell's invention did not lack novelty, and was not anticipated by Philip Reiss nor his successors.

In Equity. On rule for injunction.

J. J. Starrow, T. J. Semmes, T. L. Bayne, Geo. Denegre, E. N. Dickerson and Geo. L. Roberts, for complainants.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

J. R. Beckwith, E. H. Farrar, E. B. Kruttschnitt, J. M. Bonner,
and *A. G. Brice*, for defendants.

Before PARDEE and BILLINGS, JJ.

BY THE COURT. This cause is before us on an application for a preliminary injunction, upon bill, answers, numerous affidavits, depositions, and exhibits. We heard the application discussed by the solicitors on both sides, with many adjuncts of experiment and illustration, for the period of 21 days, and we have striven to give to the question the study and consideration to which it is entitled, from the fact that so many of our fellow-citizens throughout the entire country are interested in its decision. A very long discussion, in which solicitors of ability and learning participated,—such as has been the one conducted before us,—has one great advantage: it tends to separate, by a clear line of demarcation, that which is sound in law and sustained in fact, from that which, however plausible and forcibly urged, analysis and proof compel the abandonment of.

The complainants have urged that since the patents involved here have been the subject of judicial investigation, ending in decisions in the circuit courts of the United States maintaining their validity, that, so far as the issues presented in those causes have been identical with those involved in this cause, for the purposes of granting a preliminary injunction to run *pendente lite*, those prior decisions elsewhere obtained are sufficient. We assent to this doctrine.

The proofs submitted to us include decrees affirming these patents by Mr. Justice GRAY, Mr. Justice MATTHEWS, Judge LOWELL, Judge BLATCHFORD, Judge WALLACE, Judge NIXON, Judge McKENNAN, Judge BUTLER, Judge ACHESON; with opinions at more or less length by Mr. Justice GRAY, Judge LOWELL, and Judge WALLACE. It has been urged by the respondents that in all these causes save one there was either an absence of one or more of the defenses here urged, or collusion between the parties, and consequent imposition upon the courts; so that the decrees and decisions submitted, and referred to above, should not of themselves be the basis of the decision and decree here. In the *Molecular Case*, decided by Judge WALLACE last June, there has been no charge of collusion, and consequent imposition. We think that these causes abundantly show that the substantial defenses here submitted have been urged in several of those cases, (though perhaps they have not been urged with the vigor and persistence that have characterized the defense here,) and that the settled practice in the circuit courts of the United States would authorize the granting of the injunction *pendente lite* upon the authority of the decrees in those cases. We do not understand that the weight given by one circuit court to the adjudications of another rests entirely upon the basis of comity, but as well upon that of recognized rights, and of convenience; and that it is largely to prevent the necessity of more than one court going through with the investi-

gation of the same facts that the inference derived by the first court is for the purpose of determining whether or not an injunction shall go till the final decree, adopted by the other circuit courts. In addition to the weight to be given to the adjudications in favor of the Bell Company in other circuits on the basis of convenience, comity, and recognized rights, it is urged that the National Improved Telephone Company, the principal defendant here, is estopped by the final decree rendered by Judge McKENNAN in the *Pittsburg Case*, because it was privy to that suit, and had a day in court there.

The evidence shows that the National Improved Telephone Company, claiming to own certain letters patent pertaining to telephony, was the licensor of the Pittsburg Company, and contracted, for a consideration received, that in case of any litigation involving the validity of said letters patent, or any of them, wherein the Pittsburg Company should be a defendant, the said National Improved Telephone Company should have prompt notice thereof, and should assume control of said litigation, and, at its option, be made a party thereto at its own expense; that the Pittsburg suit did involve the validity of said letters patent; that the National Improved Telephone Company was promptly notified thereof, and did assume control of the litigation, preparing an elaborate defense, and appearing therein by counsel, who were heard by the court, and that, becoming dissatisfied by the refusal of the court to go behind the decrees of other circuits in the matter of a preliminary injunction, the National Improved Telephone Company "ordered the immediate withdrawal from the court of all the evidence, instruments, and documents of every character connected with the defense," and "immediately dismissed the counsel in said case."

In *Robbins v. Chicago*, 4 Wall. 657, it is said:

"Conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings."

See, also, *Chicago v. Robbins*, 2 Black, 418.

To the same effect are *Cromwell v. County of Sac*, 94 U. S. 351; *Chamberlain v. Preble*, 11 Allen, 370; *Tredway v. Sioux City*, 39 Iowa, 663.

The rule is applied in patent cases. *Robertson v. Hill*, 6 Fisher, 465; *Miller v. Liggett*, 7 Fed. Rep. 91.

No authorities are cited to the contrary, but counsel have argued that the National Improved Telephone Company had a right to withdraw from the litigation, and that thereupon, in some unaccountable way, the company was released from all responsibility, and that the complainant had no right to proceed to a decree. We cannot avoid the conclusion that so far as the National Improved Telephone Company is concerned in this suit, that it is bound and concluded by the final decree rendered at Pittsburg, and that that decree alone warrants the injunction *pendente lite* in this case, as against said telephone company and its privies.

But since we have had the cause so exhaustively presented, and we have so fully considered it, we have determined not to rest our conclusions upon the decrees in the other circuits, sufficient as we deem those to be, but to examine the questions *de novo*.

It is urged by the defense that there should be given a weight to the fact that the executive department of the government has directed the institution of a suit to annul this patent that should lead us to refuse or defer any affirmation of the patentee's rights till the conclusion of that suit. To this we cannot assent. The executive department has not in this case attempted to adjudicate rights, nor could it in any case do more than start the judicial inquiry, and present the cause to the courts. The filing of an information cannot create a presumption of guilt. No more can the institution of a suit to annul, create a presumption of nullity. If any effect is to be given to the pendency of this suit to annul, so as to suspend any rights of the patentee, it could only result from restraining or other orders issued in that suit, where the court having the parties and the evidence upon which the nullity is sought to be established before it, has also the authority, if to annul, then to suspend the force of the patent. There is a class of cases where the decision of the executive is conclusive upon the courts. This class includes those which present political questions,—such as which is the lawful government in a state or in a foreign country,—questions connected with functions of sovereignty, where promptness and unity of action in all the departments of government are essential. All questions properly judicial are, by the very constitution, embraced within the judicial power, and submitted exclusively to the courts.

It is necessary to consider two grounds of the invalidity of the letters patent of Alexander Graham Bell, No. 174,465, issued March 7, 1876, on application filed February 14, 1876.

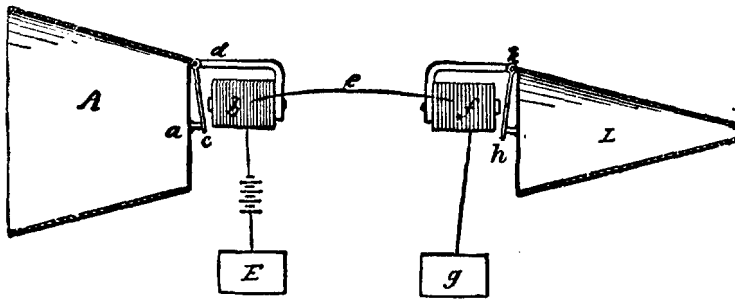
1. It is urged that after the filing of Bell's application his specifications and claim were changed in consequence of information derived through the examiner of the patent-office from the *caveat* of Elisha Gray, filed on the same day with Bell's application. We have reached the conclusion that the invention is set forth in the claim and specifications as originally filed, and that, therefore, any inquiry into this

question would lead to nothing which could affect the validity of the patent. It is overwhelmingly established that Bell made the affidavit to his claim and specifications as originally filed on the twentieth day of January, and that Gray's description of his invention embodied in his *caveat* was not written out till three or four days prior to February 14th, when it was filed.

The fifth claim of Bell, originally filed, is as follows:

"(5) The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

In the specifications originally filed by Bell there is the following figure and description and illustration of the apparatus and process.



Another mode is shown in Fig. 7, whereby motion can be imparted to the armature by the human voice, or by means of a musical instrument. The armature, *c*, Fig. 7, is fastened loosely by one extremity to the uncovered leg, *d*, of the electro-magnet, *b*, and its other extremity is attached to the center of a stretched membrane, *a*. A cone, *A*, is used to converge sound vibrations upon the membrane. When a sound is uttered in the cone, the membrane, *a*, is set in vibration, the armature, *c*, is forced to partake of the motion, and thus electrical undulations are created upon the circuit, *E*, *b*, *c*, *f*, *g*. These undulations are similar in form to the air vibrations caused by the sound; that is, they are represented graphically by similar curves. The undulatory current passing through the electro-magnet, *f*, influences its armature, *h*, to copy the motion of the armature, *c*. A similar sound to that uttered into *A* is then heard to proceed from *L*.

To simplify: In the fifth claim, and the part of the specification quoted above, the applicant declares that his invention consists in this: In the discovery that vocal or other sounds, by being uttered or otherwise communicated through a receiver, and by reason of their force being made to impinge upon an armature, impart to it the vibrations of the air; that these motions of the armature cause corre-

sponding undulations in the electrical current, so that at the end of the circuit similar vibrations are given to another armature, through it to the surrounding air, and through the air to the human ear. Thus, voice is communicated to the electrical current, and reproduced at the end of the wire in the air, and all this by reason of the discovered fact that vibrations in the air caused by sound are so similar to the undulations in the electrical current that vocal sound, of whatever character itself, may be passed from air to the electrical current, and delivered again through the air, by means of a receiving and a delivering or emitting armature. The great discovered fact was that the vibrations in the air are similar in form to the following, and imparted electrical undulations, and that the undulations are similar to the ultimate vibrations. It follows that as are the vibrations so are the undulations; whether gradual or sudden; of whatever pitch or loudness; whether constant, or varying in pitch or loudness; whether caused by a single or by successive sounds.

We think this a sufficient description of the process and apparatus, and of the whole discovery patented, and that it neither required nor did it receive any substantial changes by the amendments subsequently made, no matter from what source suggested or derived.

Another objection urged by the defense was that the apparatus described in the specifications, and illustrated by Fig. 7, is not capable of transmitting articulate speech. There are affidavits to this effect, but the affidavits in favor of the capability are very strong and satisfactory, and the court itself, through its own senses, was convinced that the transmission of speech had been completely attained by means of the Bell apparatus, as exhibited by Fig. No. 7.

The fact that Bell's invention certainly dates from January 20, 1876, and that it covers a speaking telephone, transmitting articulate speech, by means of an undulatory, oscillatory, or vibratory current of electricity, renders it unnecessary to pass upon the evidence relating to the tergiversations and claims of Gray; the alleged frauds of Bell in advancing his application for a patent; the illegal conduct and conflicting statements of Examiner Wilbur; and many alleged vices and irregularities,—the evidence of which forms the bulk of the record, and apparently the main defense in the case. At the same time, it is proper to say that in all the evidence we have found nothing that shows that Bell has done, or caused to be done, anything inconsistent with his right to be called an honest man, with clean hands. If he availed himself of information derived from Wilbur as to the contents of Gray's *caveat*, filed on the same day as his (Bell's) application, (which, however, does not appear,) he had a right to do so, to enable him to restrict and limit and clearly define his application, as the information shown to have been furnished was furnished under the authority of rule 33 of the patent-office for such purpose.

We will next consider the second ground of defense, which is that the invention of Bell lacked novelty, because it had been anticipated by Philip Reiss. That Reiss made great strides towards the discovery of the great fact or law subsequently announced in the fifth claim of Bell does not admit of doubt. That he failed to reach it is equally beyond question. Reiss discovered that, by means of the electrical current, sound could be received, transmitted, and delivered. But it was the pitch of tones that was transmitted, and exclusively by means of an intermittent make and break current,—a current incapable of conveying the form of sounds,—protracted or varying sounds,—and therefore incapacitated to convey articulate speech. His apparatus appears to have been devised in the attempt to transmit speech by electricity, but the attempt was an acknowledged failure. His apparatus, under the influence of the voice or other sounds, simply broke the circuit at each principal vibration with a frequency corresponding to the pitch of the sounds. Prof. Trowbridge says:

"It is impossible to transmit speech electrically by means of that operation, for the reproduction of articulation requires the reproduction, not merely of the number of sonorous vibrations, but what is technically known as their form or character. The electrical changes on the line wire which are to convey this characteristic from the transmitter to the receiver cannot do that unless they take note of that characteristic and bear its impress. This is as certain as any elementary proposition of geometry."

Reiss apparently had no idea of operating through a continuous, uninterrupted current, which should be undulatory, *i. e.*, should be plastic, impressible, and should be the medium of receiving freely and continuously, and reproducing exactly, the vibrations in the air, accompanying sound by the corresponding disturbances in the electrical current without any intermission of the flowing of the current. In the *Jahresbericht*, or the Annual Report of the Physical Society of Frankfort, for the year 1860–61, is an account given by Reiss himself of his invention and apparatus. It was presented to the court as translated in the biographical sketch of Philip Reiss by Silvanus P. Thompson, published in London in 1883. Upon a suggestion that the translation might be imperfect, we ordered that the memoir should be obtained from the congressional library, and should be translated into English by J. Hanno Deiler, professor of German in the Tulane University. We have carefully compared Mr. Reiss' description of his invention and apparatus as given in the two translations. While differing in the words used in the two renderings, they agree in making Reiss state that he uses an "intermittent current," and that "each sound wave effects an opening and closing of the current." This is made even more palpable by his illustration of his apparatus or instrument. This is entirely inconsistent with any idea of a continuing current which should undulate, *i. e.*, be increased or diminished merely

by an apparatus so constructed as to be susceptible of being set in motion by the vibrations of the air produced by sound; and should freely receive, convey, and deliver single or successive sounds by reason of being so constructed as to be capable of being started and continued in motion just so long as the vibrations of the air lasted. He did not apply to his instrument the law—indeed, he seems not to have designed his instrument with any reference to the law—that the vibrations in one medium had an exact correspondence to the undulations in the other, not only for an instant, but for any period of time.

The merit, and, as we think, the originality, of the Bell invention consisted in the discovery of this law, and in the construction of his apparatus so that when the sound caused aerial movements or vibrations they might, without any intermission of the current, be freely transferred or translated into electrical undulations, which again, at the end of the circuit, would freely reproduce the aerial vibrations, and thus convey, single or combined, transmitted sounds to the ear, and continue to convey them without interruption as originally uttered, whether single, combined, or successive. Reiss' result was that sound could be sent through the electric current like a missile through the air; Bell's result was that the electric current was a continuing connection between voice and ear, like the air itself.

A great fact in proof of the correctness of this deduction is that the instruments invented by Reiss, and his methods, were described in many scientific papers and works, and were well known in the scientific world; and the instruments were manufactured and on sale in Paris, Vienna, and Frankfort, and had been exhibited before the British Association, and a pair were deposited in the Smithsonian Institution; and yet before 1876 there was no speaking telephone in use, nor any pretense of any. The various reproductions of Reiss, and his methods, all were based upon the same defective electrical means,—an intermittent circuit-breaking current,—and all were practical failures for the transmission of speech until Bell's method was discovered.

From the evidence submitted in this case it seems clear that now, in the present state of the art, neither the Reiss instruments, nor any reproduction of them, can be made to transmit articulate speech, except by changes of some form in the instruments themselves, or by the employment of Bell's method. We therefore conclude that neither Reiss nor his successors anticipated the invention of Bell, as set forth in the fifth claim of his application and patent, and as illustrated by Fig. 7, described in his accompanying specification.

The Mencei defense that is brought forward in defendants' record, on this motion, taking up 120 printed pages, was abandoned by counsel on the hearing, and no effort made to sustain it.

There remains, therefore, but the question of infringement. This matter has not been squarely met by the defendants. The complain-

ants' bill alleges, and their experts testify in the opening papers, that the instruments used by the defendants consist of a microphone transmitter and a magneto receiver, which has been decided in the *Spencer and Molecular Cases* to be an infringement. The defendants in their answer, (unsworn to,) in a vague and argumentative way, deny infringement. In their affidavits they do not attempt to show what they were using at the filing of the bill; but they allege, in affidavits filed pending this motion, that "defendants' apparatus, as now used, may be more particularly defined as operating in method or principle of operation under the Reiss inventions of 1860-64, and under special inventions patented by Randall, May 21, 1878; May 4, 1880; and May 8, 1881." Complainants having filed affidavits showing infringements in this apparatus now used, leave was granted to defendants to file another affidavit, stating fully what it is that defendants use. Under this leave an affidavit of C. A. Randall (the sixth in the record) has been filed, which contains much impertinent matter reflecting on counsel and opposing experts, but throws no direct light upon the question. But from the affiant's argument we infer that he means to say that defendants are using the apparatus above referred to. The complainants urge, and their affidavits show, that the instruments of the Randall patents above referred to transmit speech by means of the Bell variations of current, and we are disposed to agree with them in this view.

Let the injunction issue.

THE SCHMIDT.

THE SCHMIDT v. BRIGHT and others.

(District Court, E. D. Pennsylvania. May 25, 1886.)

DEMURRAGE—DELAY IN LOADING—CUSTOM.

When A. agrees to have a vessel loaded for B. at the wharf of a railroad company, where it is customary to load vessels in turn, and this was done, causing some delay, however, A. is not answerable for demurrage, he having no personal control over the loading.

In Admiralty.

Charles Gibbons, for libellant.

Theo. M. Etting, for respondent.

BUTLER, J. Did respondent agree to load the schooner by the time specified in the libel? The burden of proof is on the libellant.

It is clear the libelant knew, from the start, that the coal was to be loaded by the Reading Company at its wharves; that the respondent had no control over the subject; that all vessels are loaded at these wharves in turn, according to the time of arrival. The custom of business there is well understood, and care is taken to keep it before shippers and the trade by the publication of circulars. No doubt the libelant desired and expected to be loaded by Saturday evening, following his engagement. I am not satisfied, however, that the respondent undertook and bound himself that the libelant should be. He knew as well as the latter that he could exercise no control over the subject; and that no one could tell with certainty whether the vessel could be loaded within this time or not; that the probability or improbability was a matter of calculation, which the libelant could make as well as himself. Why should he, under such circumstances, undertake to bind himself? In the midst of the conversation and bargaining, he went to the Reading office, avowedly to ascertain the probabilities, from what those in charge would say, and on his return reported, before the contract was completed. The inferences from surrounding circumstances sustain the respondent's allegation that he did not undertake to load the schooner on Saturday, but turned the libelant over to the Reading Company for his load, according to the well-known custom at its wharves; that the libelant understood this at the time, as well as the respondent, and entered into the contract accordingly. The libelant was anxious for employment,—more so than the respondent was for his services, I think,—and was willing to assume the risk of delay, which at the time seemed very slight.

HATCH v. WALLAMET IRON BRIDGE CO.

(Circuit Court, D. Oregon. May, 1886.)

INJUNCTION—REMOVAL OR MODIFICATION—PETITION—PROCEEDINGS TO ENFORCE
—WALLAMET RIVER BRIDGE.

Where an injunction has been granted restraining the erection of a bridge, the defendants enjoined cannot obtain relief by presenting a petition for removal or modification of the injunction on the ground of a change in the law, and an alteration in the plans of the bridge, but may make the point in a proceeding against them to enforce the injunction, under which the questions whether the law has been so changed, and whether the bridge being constructed is the one to which the injunction applies may be raised.

George H. Williams and Charles B. Bellinger, for petitioner.

H. Todd Bingham and Edward W. Bingham, for respondent.

DEADY, J., (*orally.*) This is a petition of the Wallamet Iron Bridge Company for the removal or modification of the injunction against the erection of the bridge which it proposes to construct at the foot of Morrison street, or some express authority or permission by means of which the company can proceed with the work. As is well known, the construction of this bridge was enjoined by a decree of this court some years ago at the suit of parties having certain riparian rights upon the Wallamet river. The court acted upon the theory that the bridge, as it was proposed to be constructed, was an obstruction to the navigation of the river, in violation of the second section of the act of congress of February 14, 1859, admitting this state into the Union; and, following the ruling in the case of *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 565, decided that it had jurisdiction of the case. The bridge was considered, upon the testimony and in the judgment of the court, to be an unwarrantable obstruction to the navigation of the river, and its construction was enjoined. No appeal was taken from this decree. Afterwards a bill of review was allowed, and an effort was made to have the decree set aside; but the court maintained its opinion, and dismissed the bill. From this decree, dismissing the bill of review, I understand, an appeal has been taken to the supreme court of the United States; but the case on the original bill remains here. Since these proceedings, the supreme court of the United States, being called upon to consider this question in the case of *Cardwell v. American River Bridge Co.*, 5 Sup. Ct. Rep. 423, has decided that language in the act admitting the state of California, similar to that used in the act admitting the state of Oregon, did not extend to the erection of a bridge in such a case; and that if the state authorized the construction of the bridge, that was authority sufficient. Since this decision by the supreme court, this court has had the same question before it in the case of *Scheurer v. Columbia-street Bridge Co.*, 27 Fed. Rep. 172, and refused to enjoin the construction of its proposed bridge at the foot of Jefferson street,

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in view of the decision in the case of *Cardwell v. American River Bridge Co.* The petition now presented assumes that, under this decision of the supreme court, the law has been changed, as if an act of congress had been passed authorizing the construction of this bridge; and therefore the court is asked to modify the injunction, or to give some leave or permission to proceed in disregard of it.

I have considered this matter carefully, and am unable to see my way clear, under any recognized authority or mode of proceeding, to grant the relief asked. The decree against which relief is sought was a final decree of this court, made years ago; and it seems to me that the only way in which the question can be brought up is by a proceeding to enforce the injunction. If the petitioners see proper to go on with the erection of the bridge, and parties interested in maintaining this decree desire to proceed by attachment against them for contempt, the court will require notice to be given to the parties, and will then proceed to examine into the question as to whether the decree should, under the circumstances, be enforced. In this investigation two questions will be considered: *First*, whether the recent decision of the supreme court has superseded the decree, and changed the law on this subject; and, *second*, whether this is the bridge in reference to which the injunction was issued.

The bridge which the company now say they propose to construct is one which will cost much more than the bridge of which the construction was enjoined, and it is to be much less objectionable as to the width and situation of the draw. I am free to say, whatever the language of the decree may be, that I do not consider the injunction in this case to be other than a command not to build the bridge which was then in course of construction, or contemplated by the defendants, or one substantially like it. The language of the decree must be construed in connection with the subject-matter. I regarded the former bridge, and still regard it, as a very unwarrantable structure; but the bridge which it is now proposed to build is much less objectionable, and, for all that appears, its construction may be no violation of the rule of law upon which the court acted under the theory by which it was originally governed in this matter.

The court quoted from the opinions in the cases of *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 431; *Baird v. Shore Line Ry. Co.*, 6 Blatchf. 463, and *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 656; S. C. 19 Fed. Rep. 347, and concluded:

Upon the authority of these two cases it is my opinion that if the law applicable to this matter has been changed, or ascertained to be different from what the court apprehended it to be, the question will properly come up on an application to enforce this decree, and, as I have said, the further question will come up as to whether this bridge was the same that was enjoined. I am unable to do more than to dismiss this petition with these suggestions, leaving the parties to bring the matter before the court in the way I have indicated.

MONTGOMERY v. ORR and others.

*(Circuit Court, N. D. Texas. April Term, 1886.)***1. COUNTIES—BONDS—COURT-HOUSE—POWERS OF COMMISSIONERS—WILBARGER COUNTY.**

Except when attacked for fraud, the decision of the county commissioners as to the character of the court-house needed is final; and, although the cost may exceed the amount for which the commissioners are presently authorized to levy taxes, they may contract for the building of a court-house; the cost thereof to be paid in bonds to be issued and delivered and made payable to the contractors, and bearing interest from the date of issuance, as soon as the taxable value of the county increases so as to enable the bonds to be issued in accordance with law.

2. SAME—PRELIMINARY INJUNCTION—PLEADING.

A preliminary injunction to restrain the action of the county commissioners, even though they are attempting to exceed their authority, will not be granted, except it appear from the pleadings that the complainant has a sufficient interest at stake in the county to entitle him to institute proceedings.

In Equity.

W. W. Leake, for complainant.

L. C. Alexander, J. G. Winter, and D. R. Britt, for respondent.

McCORMICK, J. The complainant, a citizen of Iowa, brings his bill against the county of Wilbarger, in this state, and against J. P. Orr, L. N. Perkins, and W. A. McKinney, the county judge, clerk, and treasurer of said county, and all citizens of Texas, and alleges, in substance, that complainant owns 3,400 acres of land in Wilbarger county, subject to taxation, of the value of \$30,000; that the county commissioners' court of Wilbarger county has already issued bonds of the county to the amount of \$8,000 for the erection of a jail in said county, and that said commissioners' court is about to contract for the building of a court-house at a cost of \$35,000, and to issue bonds of the county in payment therefor; that the taxable property in said county does not exceed in value \$2,000,000; that such an issue of bonds is unwarranted, and if issued, and passed into the hands of innocent purchasers, would be a cloud upon his title to his land in said county; and he prays for an injunction restraining said county of Wilbarger, and all of its officers and agents, and the said county judge, county clerk, and county treasurer, officially and personally, from issuing, negotiating, selling, signing, countersigning, or registering said bonds, or any of them, or any obligation of said county for said sum of money, or any other sums over and above what a tax of one-fourth of 1 per cent. will extinguish in 10 years. After notice to respondents, the matter came on for hearing on the twenty-fourth of April.

The respondents admit that bonds of the county to the extent of \$8,000 have already been issued for the purpose of erecting a county jail, and that the county has contracted for the building of a court-

house at a cost of \$34,900, to be paid for as follows: \$8,000 in Wilbarger county bonds, bearing 8 per cent. interest from date, and payable at the will of said county, interest payable annually on the tenth day of April, said bonds to be issued, delivered, and made payable to the contractors or order on the signing of the contract to build; and the balance of said amount to be paid in bonds to be issued and delivered and made payable to the contractors or order, and bearing interest from date of issuance at 8 per cent. per annum until paid, as soon as the taxable values of said Wilbarger county increases so as to enable said bonds to be issued in accordance with the law; the county reserving the right to pay cash in lieu of bonds, if the money can be procured from other sources than by issuing bonds. The answer shows that the county owns town lots in the county-seat now worth \$12,500, and of greater prospective value, which it is the policy and purpose of the county authorities to sell, and appropriate the proceeds, *pro tanto*, to the payment of the cost of erecting said court-house; that a railroad is being constructed into and through said county; that the population and taxable values of said county are rapidly increasing; that the complainant has not rendered any property in Wilbarger county for taxes in his own name, and that no deed, bond for title, or other evidence of title to land, showing ownership thereof by complainant, appears of record in Wilbarger county; and that there is not in Wilbarger county any 3,400 acres of land (excluding town lots and town-sites, property owned and assessed against other persons than the complainant) of the value of nine dollars an acre, or \$30,000 for 3,400 acres.

The allegations of the answer as to the complainant's not rendering in his own name any land for taxes in Wilbarger county, and that no evidence of his owning any land in that county appears on the records of said county, are supported by the affidavit of the proper custodians of the records, and are not replied to or denied in the oral argument on the hearing.

The statute provisions bearing upon this subject are:

"The county commissioners' court of any county is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such manner as may be necessary to erect a suitable building for a court-house or jail, or both; said bonds running not exceeding fifteen years, and redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent. per annum." Act twenty-seventh March, 1885.

"The commissioners' court of the county shall levy an annual *ad valorem* tax on the property in said county sufficient to pay the interest, and create a sinking fund for the redemption of said bonds not to exceed one-fourth of one per cent. for any one year. The county shall not issue a larger number of bonds than a tax of one-fourth of one per cent. annually will liquidate in ten years, and such bonds shall be sold only at their face or par value." Act February 11, 1881.

"Said courts [county commissioners' courts] shall have power, and it shall be their duty, to provide and keep in repair court-houses, jails, and all necessary public buildings." Rev. St. art. 1514.

It appears by the answer that the county has not issued, and does not propose to issue, a larger amount of bonds than a tax of one-fourth of 1 per cent. on the taxable values in the county at the time of the issue will pay in 10 years. The right of the county commissioners' court to make the contract set out in the answer depends on the power of the county to provide a court-house, and give its valid written obligation to pay therefor at a future day. It appears to me that this question is very similar to the one presented in *City of Galveston v. Loonie*, 54 Tex. 523, where the power of the city so to contract was upheld. See authorities cited in that case. Here we have a comparatively new county, just coming into notice, whose population is alleged to have trebled within a year, its taxable values rapidly increasing, and the need of a court-house pressing upon the commissioners' court. Why may they not contract for the building of such a house as will adequately meet the immediate demands of this growing population? Why should they be required, by a writ proceeding from another court, to delay the discharge of the duty imposed upon them by the law, and the choice of their fellow-citizens, or restrained from exercising in this matter that discretion with which they are clothed by law and the selection of them for that office by the people most interested? Except when attacked for fraud, their decision as to the character of a court-house that is needed is final. *Robertson v. Brudlove*, 61 Tex. 321. But, on the showing of the bill, 3,400 acres of land in Wilbarger county, claimed to be owned by complainant, is alleged to be worth \$30,000, without showing where the land is, or any reason for its being above the average value of land in that county. This is very nearly nine dollars an acre. At that rate the land alone in Wilbarger county (900 square miles) would be worth \$5,000,000, and furnish an ample basis for the issuance of bonds to pay for an \$8,000 jail and a \$35,000 court-house. But if, as is probable, the average value of land in Wilbarger county does not exceed three dollars per acre, it sufficiently appears from the bill, answer, and exhibits that the complainant is not in a position to invoke the authority of this court to restrain the action of the commissioners' court, even though said commissioners' court are attempting to exceed their authority in providing a court-house.

The prayer for a preliminary injunction is refused.

CONNECTICUT & P. R. R. Co. v. HENDEE, Receiver, etc.

(Circuit Court, D. Vermont. May 25, 1886.)

EQUITY—ORIGINAL BILL—DISMISSAL BY PLAINTIFF—COSTS.

A complainant in an original bill has, as a general rule, the right to dismiss his bill upon payment of costs, provided no decree has been made by which the defendant's rights have been adjudicated.

In Equity.

Edwards, Dickerman & Young, for orator.

George W. Hendee and Albert P. Cross, for defendant.

WHEELER, J. This cause is at issue on bill, answer, and replication. The defendant has taken and filed testimony; the orator has not. There has been no hearing, and the cause has not been set down for hearing, nor ready to be so set down. The orator claims the right to discontinue the suit on payment of costs to the defendant, and asks leave to enter such discontinuance. In *Chicago & A. R. Co. v. Union Rolling-mill Co.*, 109 U. S. 702, S. C. 3 Sup. Ct. Rep. 594, it is said by Mr. Justice Woods, in the opinion of the court, that, "as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill;" but "subject to a distinct and well-settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant." This case falls within the general rule stated, and not within the exception, and the orator appears to be entitled to have the leave granted. *Carrington v. Holly*, 1 Dick. 280.

Leave to enter discontinuance on payment of costs granted.

In re DAY and others.

(Circuit Court, S. D. New York. May 19, 1886.)

1. IMMIGRATION—COMMISSIONERS OF IMMIGRATION—ACT OF AUGUST 3, 1882—CHILDREN—LANDING STOPPED—HABEAS CORPUS—EVIDENCE NOT REVIEWABLE.

The act of August 3, 1882, vests in the commissioners exclusive power to determine whether or not immigrants are likely to become a public charge, and therefore not entitled to land. Their decision, made upon competent evidence, cannot be reviewed on *habeas corpus*, but may be reconsidered by them at any time before the return of the passengers. Additional evidence, tending to show that the passengers are not likely to become a public charge, cannot be considered upon *habeas corpus*, but must be presented to the commissioners.

2. SAME—CASE STATED—COMMISSIONERS MAY RECONSIDER DECISION.

Seven boys, from 12 to 15 years old, from a reform school in Bristol, England, arrived on the steam-ship W., designed to be sent to homes in Manitoba and in Kansas, their tickets being provided and paid for. The commissioners, not satisfied with the provision said to be made for them, refused permission to land. During investigation, by an arrangement sanctioned by the secretary of the treasury, they were taken to Ward's island, the same not being deemed a landing, and the children were brought, on *habeas corpus*, before the court. Additional facts were presented to the court, showing further sponsors, and pecuniary guaranties against their becoming a public charge. *Held*, that the commissioners had acted within their jurisdiction, and upon competent evidence; and that the new matter must be presented to them; and that the writ must be dismissed.

Habeas Corpus.

Foster & Thompson, for petitioners.

Kelly & Macrae, for Commissioners of Immigration.

BROWN, J. Arthur Day, and the seven other persons for whose benefit this writ of *habeas corpus* was procured, arrived at this port as passengers on the steamer Warwick, on the twenty-fourth of April, 1886. The petition and return show that they are children from 12 to 15 years old, who had been supported by charity at a reform and industrial school, in Bristol, England; that they had been committed to that school by the local magistrates, as truants; that most of them have one parent or both parents living in Bristol; that they were put on the Warwick, and their passage money paid to this country; that certain arrangements had been made looking to the placing of two of the children with a Mr. Hopkins, a farmer, in Manitoba, and of the rest, with persons in Kansas; and that their tickets to Kansas and Manitoba had been provided and paid for. The commissioners of emigration, acting in pursuance of the provisions of the act of congress approved August 3, 1882, (22 St. at Large, 214,) under their employment by the secretary of the treasury, in reference to passengers arriving at this port, upon examination of these children on their arrival, not being wholly satisfied as to the provisions designed for them, found that they were "unable to take care of themselves without becoming a public charge," and reported accordingly to the collector of the port, and their landing was stopped.

Upon this writ of *habeas corpus* it is sought to review the finding of the commissioners of emigration, and to reverse their decision that the children ought not to be permitted to land. Some additional facts favorable to the children have been made known on this hearing, not presented to the commissioners, including a written obligation for each of the children by a responsible resident here, furnishing indemnity against any charge that might be incurred on their account for a period of two years.

1. It is the business of the commissioners, and not of this court, to ascertain the facts, and to determine whether or not any particular passenger comes within the provisions of the statute, so as not

to be entitled to land. Section 2 of the act provides that the commissioners "shall examine into the condition of passengers arriving in any ship or vessel; and, for that purpose, they are authorized to go on board and through any such ship or vessel; and if, on such examination, there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such person shall not be permitted to land." The authority of congress to pass such regulations has been repeatedly affirmed; and the validity of the act of 1882 was sustained by the supreme court in the case of *Edye v. Robertson*, 112 U. S. 580; S. C. 5 Sup. Ct. Rep. 247.

The provisions above quoted manifestly impose upon the commissioners the duty of determining the facts upon which the refusal of the right to land depends. The general doctrine of the law in such cases is that where the determination of the facts is lodged in a particular officer or tribunal, the decision of that officer or tribunal is conclusive, and cannot be reviewed except as authorized by law. *Foley v. Harrison*, 15 How. 448; *Dorsheimer v. U. S.*, 7 Wall. 166; *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351, 375, affirmed 9 Wall. 788, 798; *Martin v. Mott*, 12 Wheat. 19; *Clinkenbeard v. U. S.*, 21 Wall. 65, 70; *The Philadelphia, etc., v. Stimpson*, 14 Pet. 448, 458. See *U. S. v. Leng*, 18 Fed. Rep. 15-20, and cases there cited; *U. S. v. McDowell*, 21 Fed. Rep. 563.

The statute of 1882 makes no provision for any review of the decision of the commissioners upon the evidence before them. No such review can therefore be had upon a writ of *habeas corpus*. That subject was elaborately considered by BLATCHFORD, J., in the *Case of Stupp*, 12 Blatchf. 501, 519, who had been held by a United States commissioner for extradition under the treaty with Belgium. The rule deduced from an examination of the authorities, and of the statutes in reference to the powers of a federal court under a writ of *habeas corpus*, is that "the court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion. * * * The proper inquiry is to be limited to ascertaining whether the commissioner had jurisdiction, and did not exceed his jurisdiction, and had before him legal and competent evidence of facts whereon to pass judgment as to the fact of criminality, and did not arbitrarily commit the accused for surrender without any legal evidence." This rule has been since repeatedly applied, and must govern the present case. See *In re Fowler*, 18 Blatchf. 430, 443, S. C. 4 Fed. Rep. 303, and

cases there cited; *In re Wadge*, 15 Fed. Rep. 864; *In re Byron*, 18 Fed. Rep. 722.

The petition and the return show that the commissioners were acting within their jurisdiction. There was competent evidence before the commissioners for making up a decision, though not all the evidence that has since been made known. The evident youth of the children; their own answers to inquiries; the absence of any person that had legal authority or control over them, or was under any legal responsibility for their support,—were all important facts. Upon these facts it was for the commissioners alone to decide whether there were suitable guaranties against the likelihood that the children might become a public charge. That the commissioners seek to combine humanity with a faithful administration of their public duties is known to the court, and is beyond question.

By the expression "unable to take care of themselves, without becoming a public charge," the law does not intend an inability having reference to the passenger's personal efforts alone. Such a construction would exclude every child from our shores, since no child, by his personal efforts alone, can take care of himself. All the means of care or support that are provided for the passenger, and are available for his benefit, must be taken into account. The law intends those only that are likely to "become a public charge," because they can neither take care of themselves, nor are under the charge or protection of any other person who, by natural relation, or by assumed responsibility, furnishes reasonable assurance that they will not become a charge upon the public.

2. Under the provisions of the act of 1882 the commissioners, so long as they retain jurisdiction over the passengers, and at any time before the return of the passengers to whom landing is refused, may reconsider their decision. Under Section 4 of the act they are charged with its execution up to the time of the actual return of the passengers, and their jurisdiction of the matter continues until the order for return has been executed. In cases like the present, therefore, where the refusal to permit the landing of passengers is based entirely upon the absence of a sufficient guaranty for the proper care of young persons, it may often happen that further knowledge of the facts, or the subsequent furnishing of sufficient sponsors, or of additional guaranties, would remove all reasonable objections. The report to the collector does not oust the commissioners of jurisdiction. That report is not for the purpose of a further hearing before a different tribunal. The passengers, by section 4, still remain subject to the disposition of the commissioners; and there is no reason why any additional facts bearing on the case, that may become known at any time before the passengers are returned, should not be considered. The summary way in which such cases must be determined in the first instance makes such reconsideration in some cases necessary. The case here is much stronger than that of the appraisers

of merchandise, whom the supreme court, in the case of *Bartlett v. Kane*, 16 How. 263, held to be authorized, after their report to the collector, to make a re-examination, and to modify their report, even though an appeal had been already taken from their decision. See, also, *Iasigi v. Collector*, 1 Wall. 375, 383.

3. The additional evidence, and the pecuniary guaranties in behalf of the children, produced before me, must be submitted to the commissioners, and not passed upon by this court in the first instance. The court could not undertake to determine their sufficiency without substituting its own judgment upon the facts in place of the judgment of the commissioners, whose duty it is by law to determine the question, and who have never had presented to them the additional matter referred to. As the commissioners are acting clearly within their jurisdiction, and upon competent evidence, this court cannot review their determination upon *habeas corpus*.

The additional matter must be presented to them, and this writ dismissed.

UNITED STATES v. THOMAS.

(District Court, S. D. Mississippi. May 20, 1886.)

OBSCENE PUBLICATIONS AND PRINTS—MAILING OBSCENE WRITING—SEALED LETTER—SECTION 3893, REV. ST., CONSTRUED.

An obscene letter, sealed, is within the meaning of section 3893 of the Revised Statutes, which prohibits the mailing of every obscene writing, print, or other publication of an indecent character, etc.¹

Defendant was indicted for depositing in the mail a certain obscene writing, inclosed in a letter envelope. Motion was made to quash the indictment upon the ground that the statute did not embrace sealed writings.

J. B. Harris, U. S. Atty., for the United States.

J. S. Sexton, for the motion.

HILL, J. The indictment against the defendant in substance charges that the defendant did unlawfully and knowingly (on a day named) deposit in a post-office (naming it) a certain obscene, lewd, and lascivious writing, addressed to a female (naming her) at a certain other post-office, (naming it,) and which said writing was then and there inclosed in a letter envelope, contrary to the provisions of section 3893 of the Revised Statutes of the United States, as amended by the act of congress approved July 12, 1876, and against the peace and dignity of the United States. The obscenity of the writing is given as a reason for not setting out the writing in the indictment.

The defendant moves to quash the indictment for the reason that

¹See note at end of case.

it, being alleged that the writing was inclosed in a letter envelope, is not embraced in the act of congress alleged to have been violated, and that the indictment charges no criminal offense. Whether it does or not is the only question to be decided.

Considering the purpose of the statute, which evidently is to prevent the United States mail from becoming a vehicle for the transmission of obscene and lewd books, pictures, and writings, I am satisfied that such a writing as the one described in the indictment is embraced in the statute, though inclosed in a letter envelope and mailed; and would so hold if the statute were now to be construed for the first time; but it has been passed upon a number of times by judges of high character, and long experience, and some diversity of opinion.

The decision of Judge TURNER, of the Western district of Texas, in the case of *U. S. v. Comerford*, reported in the Criminal Law Magazine, 465, S. C. 25 Fed. Rep. 902, is mainly relied upon to sustain the motion. This decision is in direct conflict with that made in the case of *U. S. v. Gaylord*, 17 Fed. Rep. 438. The opinion of Judge DRUMMOND in this case, to my mind, is unanswerable. This case arose in the Southern district court of Illinois. Judge TREAT of that court, one among the oldest, as well as ablest, of our district judges, held that the statute referred to embraced letters or writings inclosed in letter envelopes addressed in the usual way with other letters. On writ of error from the circuit court, this ruling was sustained by Judge DRUMMOND, the circuit judge, whose opinions on all questions command the highest respect from the profession throughout the United States, and in which Justice HARLAN of the supreme court, assigned to that circuit, concurs.

If I had any doubt on the question, the concurrent opinion of three of such learned and eminent jurists ought to have more weight than that of a single judge, though of equal learning and experience; so that, in addition to my own convictions, I must hold that the weight of authority is in favor of the sufficiency of the indictment. Judge TURNER rests his conclusions on the supposition that the offense consists in its publication, and that the sending of a sealed writing is not a publication of its contents.

Section 5480 of the Revised Statutes makes it an indictable offense to use the mails of the United States in furtherance of any scheme to defraud others. These communications are usually sent in sealed envelopes.

As was held in the case of *U. S. v. Jones*, 10 Fed. Rep. 469: "The gist of the offense is the abuse of the mails. The mailing of the letter and the letter itself constitute the *corpus delicti*." Other decisions might be cited; but, in my opinion, both by reason and the decided weight of authority, the objection made to this indictment is not well taken; therefore the motion to quash the indictment will be overruled.

NOTE.

Written communications of a private, personal character, emanating from a single person, and exhibiting no purpose of going beyond the one directly addressed, are not within the purview of section 3893 of the Revised Statutes, as amended by section 1, of the act of July 12, 1876, (19 St. 90,) relating to the mailing of obscene letters. *U. S. v. Williams*, 3 Fed. Rep. 484.

A sealed letter, deposited in the mail, addressed to some one, is not a writing or a publication, within the purview of the first clause of section 3893 of the Revised Statutes, declaring obscene books, writings, etc., or "other publication of an indecent character," non-mailable. *U. S. v. Loftis*, 12 Fed. Rep. 671.

A sealed letter is not within the prohibition of section 3893, however indecent or obscene in its contents; but if there is any such delineation put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime. *Id.*

The mailing in a sealed envelope of a letter which, in whole or in part, contains matter which would have a depraving, a demoralizing, or a corrupting influence on the person to whose hands it might come, is an offense within the meaning of section 3893 of the Revised Statutes. *U. S. v. Britton*, 17 Fed. Rep. 731.

 ASMUS v. ALDEN.

SAME v. FREEMAN.

(Circuit Court, E. D. Pennsylvania. May 13, 1886.)

1. PATENTS FOR INVENTIONS—REISSUE—NEW CLAIM—VALIDITY.

Where matter claimed in the reissue was embraced in the original patent, but not claimed therein, *held* not an enlargement of the invention, and may be secured by reissue.¹

2. SAME—LACHES—LIMIT FOR REISSUE.

Two years seem to have become the measure of reasonableness or limit of time within which, ordinarily, the application must be made.

3. SAME—JURISDICTION OF COMMISSIONER OF PATENTS.

Whether the omission occurred through "inadvertence, accident, or mistake" is (in proper cases for amendment) a question for the commissioner.

4. SAME—NEW CLAIMS.

Miller v. Brass Co., 104 U. S. 350, does not prohibit the introduction of new claims, under all circumstances. It simply applies the equitable doctrine of estoppel to a patentee who, after inexcusable delay, (during which others may be presumed to have acted on the reasonable inference that all not claimed in the patent has been dedicated to the public,) sought, by means of a reissue, to enlarge the scope of his patent, so as to embrace and prohibit such acts.

5. SAME.

The Combined Patents Can Co. v. Lloyd, 11 Fed. Rep. 149, cited and approved.

6. SAME—INFRINGEMENT.

Differences in size, form, and degree not material.

7. SAME—FORMER ADJUDICATION, EFFECT OF.

Former decree by circuit judge is not final between others; but, involving apparently same questions, is entitled to little, if any, less weight on that account; and in case of difference of opinion between district and circuit judges, the former would not act without rehearing by latter.

8. SAME—REISSUE CONSTRUED, AND HELD VALID.

Reissue No. 3,204, dated November 24, 1868, given on original letters patent No. 70,447, granted November 5, 1867, to George Asmus, assignee of F. W. Lurmann, for blast-furnaces, considered valid.

¹See note at end of case.

9. SAME—INVENTION—WHAT CONSTITUTES.

What constitutes invention in the legal sense is difficult of exact definition in terms. Where, however, an old device or machine in general use, with acknowledged serious defects, which have been long endured because no one has previously discovered a means of obviating them, is taken in hand, and, by changing its form of structure, they are removed, and a different and greatly improved result obtained, it may safely be affirmed that the change required invention. Where the improvement, and consequent public benefit, is great, very little evidence of invention is required.

In Equity.

Bakewell & Kerr, for complainant.

Wm. D. Baldwin and Wayne MacVeagh, for respondents.

BUTLER, J. These cases involve the same matter, and have been heard together. The suits are for infringement of letters patent No. 70,447, dated November 5, 1867, reissued November 24, 1868, (No. 3,204,) to George Asmus, assignee of F. W. Lurmann. The infringement charged originally was of the first and several of the subsequent claims. At a later stage in the litigation the charge was limited to the first and sixth. On the argument it was further limited to the first. The answer denies the validity of the patent, and the alleged infringement.

First. Is the patent (as respects this claim) valid? *Second.* Has it been infringed?

Its validity is attacked on several grounds: (1) That the matter covered is not original with the patentee; (2) that it does not involve or show invention; (3) that it was not embraced in the patent, as originally issued.

These objections will be considered in their order.

1. Is the matter claimed original? The state of the art prior to the patent, shows that blast-furnaces (the cylinders of which are not involved, and need not be described) were constructed with a "forehearth," sometimes called a "tump,"—being an outward projection at one side, (commencing a few feet above, and continuing to the foundation,) into which, from the hearth proper, (situated immediately behind, at the bottom of the cylinder,) there was an opening, which allowed the molten iron and cinder to flow out. This projection was covered by a movable horizontal metallic "weight-plate." The molten iron and cinder were thus drawn off from the bottom or hearth of the furnace into the "forehearth," the cinder being lighter, and floating on top. When the latter rose nearly to the level of the blast-pipes or "tuyeres," it was removed, through an opening just above the level of the fused iron. The act of removing it was called "tapping the cinder," and its performance was necessary several times in the intervals between drawing off the iron, (through an opening below.) This operation of removing the cinder—known as "working the furnace"—was a laborious and disagreeable performance. Mr. Grittinger describes it as follows:

"The working of the furnace consisted in the removal of effete or dead matter that accumulates in the forehearth, by forcing the same upward with

a slight blast pressure, and then shoveling it off. It was necessary at times to loosen the material by means of wringers and crust-bars, which were inserted in the forehearth. It frequently happened that the slag and effete matter chilled, and could be removed only with difficulty. In such cases we were compelled to abandon the working of the furnace in the manner above described, and remove the slag through the opening marked 'Cinder-notch' on sketch No. 2, until the forehearth, by the operation of the furnace, became hot enough to undermine the crust, melt the effete matter, and make the crust removable. We frequently ran for weeks with the forehearth in this chilled condition."

Other serious difficulties were experienced in the use of the forehearth, among which was the chilling, occasionally, of the hearth, forming what is known as "salamander," stopping the operation of smelting, and requiring the removal of some part of the walls of the furnace before the operation could be resumed. In this state of the art it occurred to Lurmann that these serious disadvantages might be avoided by dispensing entirely with the forehearth, (continuing the wall of the furnace perpendicularly down to the foundation, thus closing the breast,) and drawing off the cinder or slag by means of an aperture leading directly to the hearth, the aperture, to be water-cooled, so as to protect its walls; and that by employing a device called a "cinder-notch," which may be fitted into the aperture, the flow of molten cinder might be regulated. This conception, after being tested by experiment, was carried into practical operation, and the patent in suit obtained.

While the claims are seven in number, the distinct elements or parts of the invention seem to be three: (a) The closed breast. (b) The water-cooled slag discharge, leading directly from the hearth. (c) The device for regulating the flow of molten slag. The principal in importance would seem to be the first, which is made an element of the claim now involved. It might well have been made the entire subject of the claim. The patentee, however, has associated with it the water-cooled slag discharge, and thus qualified and limited his right. That the matter covered by the claim was original with Lurmann is reasonably clear. Certainly there is no such evidence of anticipation as serves to repel the contrary presumption arising from the patent. The defendants' evidence seems, virtually, to ignore that part of the claim which relates to the closed breast, attacking simply the water-cooled slag discharge, as separately claimed elsewhere. If this attack were sustained, it would be immaterial to the result. The combination of the slag discharge, even if old, with the hearth of the closed breast furnace, would form a valid claim. While, therefore, it is unnecessary to discuss the novelty of the slag discharge, described as an element in this claim, it is proper to say that I am not satisfied it is old. The record, in my judgment, fails to disclose anything calculated to cast doubt on the novelty of the combination described in the claim, or of the first element in this combination, (the closed breast furnace.) Some reference was made on

the argument to a cupola furnace,—a different structure, intended for a different purpose; but the record contains no description even of this. How it resembles (if at all) the blast-furnace here involved, and why, therefore, it should be regarded as anticipatory, the court is not informed.

2. Did the patentee's improvement of the old furnace require invention? This question, I think, is free from doubt. What constitutes invention, in the legal sense, is difficult of exact definition, in terms. Where, however, an old device or machine in general use, with acknowledged serious defects, which have been long endured because no one has previously discovered a means of obviating them, is taken in hand, and, by changing its form or structure, they are removed, and a different and improved result obtained, it may safely be affirmed that the change required invention. Where the improvement, and consequent public benefit, is great, very little evidence of invention is required. *Smith v. Goodyear Co.*, 93 U. S. 486; *Washburn & M. Manuf'g Co. v. Haish*, 4 Fed. Rep. 907; *Eppinger v. Richey*, 14 Blatchf. 307; *Isaac v. Abrams*, 14 O. G. 862. The advantages arising from the plaintiff's improved furnace are very great, as the record shows,—among them, that it admits of a higher pressure of air, diminishes the labor attending the operation of smelting, increases the product while diminishing the cost, and lessening (if not avoiding) the danger of chilling. Indeed, so great are the advantages that it has virtually driven the old form of furnace out of use, where the business of smelting is largely carried on.

3. Was the matter covered by the claim embraced in the original patent? The claim itself certainly was not. The matter claimed, however, as certainly was. The specifications originally filed say, among other things:

"This invention relates to furnaces for smelting iron ore, and has for its object to dispense with the tymp or forehearth ['tymp', we see, is used synonymously with 'forehearth'] and the wall stone, now in common use in iron blast-furnaces, and to replace the tymp arrangement by such a construction as allows the slag to be tapped directly from the hearth. * * * My furnace has no tymp, [that is, no forehearth,] and the sides of the hearth, whether round or square, extend clear round to the bottom stone, the usual opening being made in the lower part of the hearth for the discharge of the iron."

This language is as clear a description of the closed breast furnace as could well be written. Calling it a closed breast furnace would not be clearer. A furnace built in accordance with this language would necessarily be closed breasted.

The other element of the claim,—“where the slag is discharged through an opening or openings cooled by water,”—is no less clearly described.

The drawings originally filed show the same. The claim might, therefore, have been embraced in the patent as first issued, or introduced into the reissue without changing the specifications. The change subsequently made simply expresses the same thing in dif-

ferent terms. The claim is not, therefore, an enlargement of the invention as shown by the patent-office or the patent. That such additional claims, omitted through "inadvertence, accident, or mistake," may be secured by means of a reissue, if applied for within reasonable time, is not open to question. Two years seems to have become the measure of reasonableness, or limit of time, within which, ordinarily, the application must be made. Here it was made a little after the expiration of one year. Whether the omission occurred through "inadvertence, accident, or mistake" is (in cases proper for amendment) a question for the commissioner. The learned counsel for defendants think *Miller v. Brass Co.*, 104 U. S. 350, worked a change in this respect, prohibiting the introduction of new claims under all circumstances. This is a mistake. Such a result could only follow a repeal or disregard of the statute governing this subject. *Miller v. Brass Co.* simply applied the equitable doctrine of estoppel to a patentee who, after inexcusable delay, (during which others may be presumed to have acted on the reasonable inference that all not claimed in the patent has been dedicated to the public) sought, by means of a reissue, to enlarge the scope of his patent so as to embrace and prohibit such acts. My understanding of this case, and its bearing on this subject, was fully expressed in *Combined Patents Can Co. v. Lloyd*, 11 Fed. Rep. 149. Subsequent cases have contained nothing different.

Second. Has the claim been infringed? This question also must be decided against the defendants. Their furnaces are built with closed breasts, distinguishable in no material respect from the plaintiff's, and have water-cooled slag discharges leading directly from the hearth. It is no answer to say that these slag discharges are not water-cooled to the same extent as plaintiff's; nor that the defendants do not use the cinder-notch, which is made the subject of plaintiff's seventh claim, and designed to regulate more completely the discharge of molten cinder. As we have seen, the plaintiff's patent contemplates the use of the slag discharge without, as well as with, this notch. If it were true that the slag discharge embraced in the first claim contemplated the constant employment of the cinder-notch, the only difference between the defendants' discharge and the plaintiff's, thus constructed, would seem to be in the size and form of the opening, and the degree of water-cooling; which would not be material.

Thus far we have not alluded to the suit brought in the Western district of this state, founded on this patent, against the Dunbar Furnace Company and others, in 1877, which appears to have involved the questions now presented, and in which a decree was entered for the plaintiff. While the decree was not final, it was, under the circumstances, entitled to little, if any, less weight on that account. No opinion was filed, and the defendants here insisted upon being heard as if the questions had not previously been considered. The plaintiff seeming in some measure to acquiesce in this, I have so heard them.

Had I reached a different conclusion, however, I would not have acted upon it without a rehearing before the circuit judge who entered the decree referred to.

A decree will be entered for the plaintiff in pursuance of this opinion.

NOTE.

Reissues.

When original and reissue for different inventions, latter void. *Heald v. Rice*, 104 U. S. 737; *Gosling v. Roberts*, 1 Sup. Ct. Rep. 26.

Identity of original and reissue question of law for court. *Heald v. Rice*, 104 U. S. 737.

Where original claims combination, and reissue claims combination of smaller number of elements, reissue void. *Mathews v. Machine Co.*, 105 U. S. 54; *Bantz v. Frantz*, Id. 160; *Johnson v. Railroad Co.*, Id. 539; *Gage v. Herring*, 2 Sup. Ct. Rep. 819; *Clements v. Odorless Co.*, 3 Sup. Ct. Rep. 525.

Reissue claims broader than original claims, void. *Moffitt v. Rogers*, 1 Sup. Ct. Rep. 70; *McMurray v. Mallory*, 4 Sup. Ct. Rep. 375; *Turner & Seymour Co. v. Dover Co.*, 4 Sup. Ct. Rep. 401; *Mahn v. Harwood*, 5 Sup. Ct. Rep. 174; *Torrent & Arms Co. v. Rodgers*, 5 Sup. Ct. Rep. 501; *Wollensak v. Reiher*, 5 Sup. Ct. Rep. 1137; *Miller v. Foree*, 6 Sup. Ct. Rep. 204; *Brown v. Davis*, 6 Sup. Ct. Rep. 379; *Yale Lock Co. v. Sargent*, 6 Sup. Ct. Rep. 935.

JOHNSON v. WILCOX & GIBBS S. M. Co.¹

(Circuit Court, S. D. New York. May 21, 1886.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT BEFORE ISSUE.

When an assignment is made pending an application, or in contemplation of an application, for letters patent, it is fair to assume that the parties contract with reference to the legal title which they expect will then be granted.

2. SAME—INVENTION OR IMPROVEMENT.

The word "invention" or "improvement," when used in an assignment with reference to a pending application, refers to the subject-matter of the grant, and not to a possible future title which may be granted out of personal consideration for the inventor, *i. e.*, an extended term.

3. SAME—COVENANT CONSTRUED.

A covenant by the owner of an invention to assign to himself and another jointly "said letters patent about to be issued," does not embrace the interest of the assignor in extending the patent.

S. G. Clarke and Edwin B. Smith, for plaintiff.
Stephen A. Walker, for defendants.

WALLACE, J. The demurrer to the complaint is not well taken, unless an assignment by an inventor of his "right, title, and interest in said improvement," without more, carries to the assignee title to an extension of the original patent. The defendant relies in support of the demurrer upon *Hendrie v. Sayles*, 98 U. S. 546. In that case the assignment was of "all the right, title, and interest whatever which we now have, or by letters patent would be entitled to have, and possess in the aforesaid invention, to the full extent and manner

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

in which the same would have been, or could be, held and enjoyed by us had this assignment never been made." The court, in the opinion of Mr. Justice CLIFFORD, cite with approval the case of *Clum v. Brewer*, 2 Curt. C. C. 520. In that case CURTIS, J., used this language:

"I am inclined to the opinion that a sale of 'the invention' before letters patent are obtained does not necessarily carry with it the exclusive right for the extended term, because this right is not a mere incident of the invention. Its existence is made to depend, not only on matter which is subsequent to the invention, but exclusively personal to the inventor himself; and only he or his personal representatives can obtain it. This may distinguish the case from *Carnan v. Bowles*, 2 Brown, Ch. 80. But at the same time it must be admitted that where an inventor has, in terms, sold to another person a part of his invention, he has done that which is quite consistent with the intent to have that other person participate in all the rights which he as an inventor can acquire by law; and that where the invention is the subject sold, it would be natural to find in the instrument of sale something showing an intention that the purchaser should be interested, not merely in the letters patent, but in any extension thereof securing the exclusive right to the same invention which was the subject of the sale. Taking the whole of this deed together, I think it quite clear such was the intention of its parties. It superadds to the words 'my invention' the words 'rights and property that I may have from any letters patent for the same.' These terms are broad enough to include the extended letter patents now in question."

In *Hendrie v. Sayles* the cases of *Railroad Co. v. Trimble*, 10 Wall. 367, and *Nicholson Pavement Co. v. Jenkins*, 14 Wall. 452, are also cited as pertinent. In both of these cases the assignment was not merely of the invention, but also of all the rights of the inventor to letters patent "which are or may be granted." In the latter case the court, by Mr. Justice DAVIS, delivering the opinion, say:

"Manifestly, something more was intended to be assigned than the interest then secured by letters patent. The words 'to the full end of the term for which the said letters patent are or may be granted' necessarily import an intention to convey both a present and future interest, and it would be a narrow rule of construction to say that they were designed to apply to a re-issue merely, when the invention itself, by the very words of the assignment, is transferred."

Assuming that an assignment of the inventor's interest in the "improvement" is the same thing as an assignment of his interest in an "invention," the authority upon which the defendant relies, when considered in reference to the facts of the particular case, does not sustain the defendant's contention; and the present case falls directly within the distinction suggested by CURTIS, J., in *Clum v. Brewer*. When an assignment is made pending an application, or in contemplation of an application for letters patent, it is fair to assume that the parties contract with reference to the legal title which they expect will then be granted. As is said in *Woodworth v. Sherman*, by STORY, J., (3 Story, 178:)

"In the first place, the grantor or assignor cannot be presumed to have received any compensation or consideration, except for the very thing, and to

the very extent, which the language properly indicates. In the next place, no court is at liberty to add to the terms used any meaning beyond their ordinary import, unless there are some supplementary expressions to justify such a construction."

The word "invention" or "improvement," when used in reference to a pending application, naturally refers to the subject-matter of the expected grant, and would seem more appropriately to refer to that alone than to a possible future title which may be granted out of personal consideration for the inventor. It has been held in several cases in the circuit court that an assignment of an interest in an invention, and letters patent therefor, made before the expiration of the original term, does not carry with it any interest in a subsequently extended term, unless the agreement contains a specific provision to that effect. *Gear v. Grosvenor*, 6 Fisher, 321; *Wetherill v. Zinc Co.*, Id. 50; *Holmes v. Sprague*, 4 O. G. 581.

The complainant in this case alleges that the plaintiff entered into a written contract with one Emory, in which it was agreed that the latter "should advance certain sums of money, which would be required to take out said (original) letters patent; and that the former, in consideration thereof, should assign to himself and said Emory jointly said letters patent about to be issued," and that said contract was duly recorded in the patent-office. Within all the authorities, such an assignment would not carry the interest of the patentee in extending letters patent. The defendant's argument is based upon the recital contained in the original letters patent,—“he (the inventor) having assigned his right, title, and interest in said improvement to himself and Francis F. Emory.” This recital should not be construed to countervail the allegation in the bill of an assignment of the letters patent merely. If the case were to be decided upon this consideration alone, the demurrer would have to be overruled.

Judgment is ordered for the plaintiff on the demurrer, unless the defendant answers.

MAY v. COUNTY OF FOND DU LAC.¹

(Circuit Court, E. D. Wisconsin. May 15, 1886.)

1. PATENTS FOR INVENTIONS—INVENTION.

To be patentable, a thing must not only be new and useful, but must amount to an invention or discovery.

2. SAME—COMBINATIONS.

Each and all of the separate parts of a combination may be old and well known. Nevertheless, if the combination is new, produces a new and useful result, and requires more than mere mechanical skill to produce it, it is patentable.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

3. SAME—PIONEER INVENTORS—IMPROVERS.

A patent original in its character is entitled to a broader construction than one which is for a mere improvement.

4. SAME—INFRINGEMENT.

An infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery.

5. SAME—WHAT INFRINGES.

Whether or not one machine is an infringement of another does not necessarily depend upon whether the mechanical constructions are different, but whether the new idea is completely embodied in the structure as found.

6. SAME—MECHANICAL EQUIVALENTS.

A mere mechanical substitute for a thing must be regarded as the thing itself.

7. SAME—DEFINED.

Mechanical devices are equivalents when skillful and experienced workmen know that one will produce the same result as another

8. SAME—QUESTION FOR JURY.

Whether the defendant has used substantially the same means, or, in other words, mechanical equivalents, to accomplish the same result, is a question for the jury to determine.

9. SAME—INFRINGEMENT—DIFFERENCE IN DEGREE.

To constitute an infringement, it is not necessary that the result accomplished should be precisely the same in degree as that of the inventor, but it must be the same in kind.

10. SAME—EXPERT TESTIMONY, FORCE OF.

The testimony of a mechanical expert, in a suit for infringement, must be tried by the same tests that are applied to the evidence of other witnesses; and it must receive just such credit and weight as it appears to be entitled to from all the circumstances, and no more.

11. SAME—DAMAGES—ESTABLISHED ROYALTY.

A fixed royalty, at which the right to use the patented device was sold, being shown, such royalty constitutes the proper measure of damages.

12. SAME—INTEREST ON DAMAGES.

In this case the jury were instructed that if they allowed damages they should also allow interest at the rate of 7 per cent. from the date of commencing suit.

Suit at law to recover damages for infringement of letters patent No. 25,662, granted to Edwin May, October 4, 1859, for improvements in the construction of prisons, extended October 4, 1873, for seven years, damages being claimed only for infringements committed within the extended term. Defendant pleaded—*First*, the general issue; *second*, the statute of limitations of the state of Wisconsin as to so much of the cause of action as was for the alleged infringements committed prior to the twenty-ninth day of September, 1879, (six years before the suit was commenced;) *third*, lack of novelty, in that one Radcliff, then a prisoner in the state prison at Waupun, Wisconsin, was the original inventor; and, *fourth*, prior use at said Waupun.

G. W. Hazelton, Edward Taggart, and M. C. Burch, for plaintiff.
Shepard & Shepard and F. F. Duffy, for defendant.

DYER, J., (charging jury.) This is a suit at law to recover damages for the alleged infringement of a patent granted to Edwin May, on the fourth day of October, 1859. As you are aware, when a party invents a new and useful device or improvement, the laws of the United States provide that, for a limited term of years, he shall have an ex-

clusive property right in such invention, which means the sole and exclusive privilege of manufacturing, using, and selling the same. If the subject-matter of a patent possesses the requisites of novelty and utility,—if it constitutes an invention or discovery,—the owner of the patent, and of the rights secured by it, will be protected against the use of it by any other person without his consent. As the product of his inventive faculty, the invention is just as much the property of the inventor as his house or farm, and no man has the right to appropriate it to his own use, against the patentee's will, any more than he has to take from him his house or farm. The laws of the United States on this subject are designed to encourage meritorious and useful inventions, and to protect their owners in the profitable enjoyment of them during the period fixed by the statute. If, therefore, a new and useful invention, covered by a valid patent, is exhibited in this case, and if the defendant has unlawfully pirated upon it, the plaintiff is entitled to recover damages on account of such invasion of her rights, the same as if she had suffered disturbance of any other property right. As I have said, the patent in suit was granted October 4, 1859. The term of the patent was 14 years; so that the original term expired October 4, 1873. But, as provided by law, the patent was renewed and extended for the further term of seven years from and after the expiration of the first term; so that the patent continued in force until the fourth day of October, 1880, when it finally expired. It seems that on the twenty-seventh day of February, 1880, the patentee, Edwin May, died, and, in the course of administration of his estate, there was a sale of all rights under the patent, by the administrator, to the plaintiff, who became the owner in law, on the sixth day of March, 1882, of all rights of action and claims for damages on account of infringements of the patent which accrued prior to October 4, 1880.

It is charged by the plaintiff that between the fourth day of October, 1873, when the patent was extended, and the fourth day of October, 1880, when it finally expired, the defendant, the County of Fond du Lac, wrongfully, and without license from the plaintiff or her assignor, or the patentee, used a mechanical apparatus which was an infringement of the patent; and it is on account of this alleged use that the plaintiff seeks to recover damages. The patent relates to an alleged new and useful improvement in the construction and operation of prisons. The evident object of the improvement is to avoid the necessity of actual contact with the prisoners, while the keeper can observe their movements, and, with security to himself, control them. The patent is what is known as a combination mechanical patent, and the utility of the thing or things patented is apparent, I think, at a glance. To construct a jail or prison so that prisoners can be safely kept, and their movements controlled, and so that the jailer is at the same time secured from violence, is without doubt a beneficial object. A model of the patentee's improvement has been

exhibited to you. In practical operation of the alleged invention, as stated in the specifications of the patent, the jailer, upon going into the outside entrance, is separated from the hall or room in which the prisoners may be by an angle door, which is locked, and which, from its peculiar shape, enables him to observe all parts of the hall, and the movements of the prisoners. Upon opening a small side door, (which side door has no relation to the patent,) he has access to a crank, which operates the doors in the partition between the first room and the rooms adjoining the cells, by means of an endless chain or rope, which passes around a drum, and is attached to a hinge or joint of a lever connected with the partition doors. Prisoners in the first room or hall being ordered to retire through these doors, the doors are then fastened by operating the crank before mentioned. The keeper may then unlock the angle door, and pass into the first hall or corridor, and is separated from the prisoners by the partition between it and the room beyond. Then, the prisoners being ordered to their respective cells, the doors of the cells may be fastened by operating a lever in the first corridor connected with bars, which, upon being drawn by means of connecting bolts, secures the doors. The keeper may then pass in and lock the cell doors, and thus a partition or iron grating is all the time kept between the prisoners and the keeper.

There are four claims in the patent, but it is not contended that the defendant infringes the second claim. The first, third, and fourth claims are here involved. The first claim is for the angle door, when constructed and operated substantially as set forth, in combination with the lock or bolt which secures it so as to prevent entrance through it from within to the outside. The third claim is for the endless chain or rope, in combination with the levers by which the partition doors are operated, when constructed and operated substantially as and for the purposes set forth. The fourth claim is for the combination and arrangement of the levers, bars, and bolts or lugs connected with the cell doors, *when operated from without the grating*, substantially as and for the purposes set forth.

Now, I suppose, gentlemen, that you understand just what these claims are. The first claim, you will understand, [illustrating from the model,] is for this door, which is called an "angle observation door," and the fastening of that door, which is just inside this little space into which the door opens. The second claim (the third claim, as mentioned in the patent; the second claim in question here) is for this endless chain or rope, in combination with the levers, D,—that is, the levers with which it connects here; and by means of which these doors—the doors in this partition between the first corridor and the cell rooms—are operated; and the last claim is for this lever inside the corridor, in connection with the bars and bolts and lugs, by means of which the cell doors are operated. These are the several claims said to be infringed, and each is known as a combination claim;

that is, each is a claim for a combination of several mechanical structures.

The patent law recognizes as patentable an improvement in any art or mechanical construction or combination which is useful to the public, and not before known. To be patentable, a thing must not only be new and useful, but must amount to an invention or discovery. Although the result is produced by a mechanism which combines old mechanical elements or powers, without the use of any new element, the true question in such a case is whether the combination of elements by the patentee is new. If they have never been combined together in the manner stated in the patent, and if the combination is new and useful, not being the result of mere mechanical skill, but of invention, then it is patentable. Each and all of the separate parts of a combination may be old and well known. The combination may contain the lever, the pulley, the wheel, and other well-known and long-used devices which would not, separately, be patentable; nevertheless, if the combination is new, and produces a new and useful result, it—that is, the combination—is patentable. Almost all combination structures are made up of separate parts and elements which are old and well known, and if that fact alone would invalidate a patent, some of the most valuable inventions of the present day would at once become the common property of the public, and valueless to their owners. The law does not encourage or sanction the defeat of combination patents on the ground that the several parts are old, if the combination is new and useful.

The patent here in question has been passed upon by the late circuit justice of this circuit, (Mr. Justice DAVIS,) in a suit at law like this, to recover damages for infringement. As appears from his charge to the jury, which we have before us, no combination was shown, as none is shown here, anticipating May's invention. In that case, as in this, the questions of originality, novelty, and patentability arose upon the patent itself, and the mechanical structure patented; and Judge DAVIS held the patent valid, and instructed the jury that the combination patented, exhibited invention, and was entitled to protection. That ruling, thus made in this circuit, by my official superior, ought to be controlling here, and I regard it as controlling; the same patent being involved in both cases, and it not appearing that anything materially different is shown here from what was shown there. Judge DAVIS says that the May patent is really for a method unknown before of bolting prison doors without coming in contact with prisoners. "To do this in the way shown," he said, "is patentable, and he is to be considered as the original combiner of this mechanical arrangement so as to produce the intended result. In doing this, he has used nothing new, nor was he required to do it. Bolts, bars, locks, levers, and pulleys are all old; but the patentee used them in such a way that the jailer can control the prisoners by working the doors while remaining away from the prisoners. It is the

working of the doors so as to avoid the necessity of actual contact with the prisoners, which is his invention. This is his idea, as he has carried it into successful practice." This was the view taken of this patent by Judge DAVIS in the Indiana case, and in that view I fully concur. The patentee was a pioneer in the field. His patent was an original one. He did not, so far as is shown here, merely construct an improvement on a structure previously patented. As Judge DAVIS said, he was the original combiner of the various parts of his apparatus, arranging them so as to produce a new and useful result.

The claims of the patent are to be read in the light of, and in connection with, the specifications. This is an elementary principle in patent law, and, so reading them,—that is, reading them in the light of what was sought to be accomplished,—it does not do to say that the mere connection of a lever with bars and bolts, or the connection of a lever with an endless chain, or the mere attachment of a lock to a door, or the mere construction of a door of peculiar shape, does not constitute invention. The adjustment of the apparatus, the relation of the different combinations to the jail or prison, the objects sought, and the results attained, are all to be considered; especially in a patent like this, original in its character, and therefore entitled to a broader construction than one which is for a mere improvement on something of the same nature which has been previously invented. This would be naturally and was undoubtedly the view taken of this patent by Judge DAVIS, and I think it the correct view. So the conclusion is that the patent in suit was valid, and that the combinations therein described were patentable.

All this it was perhaps unnecessary to say to you, because the only question which it is necessary for you to consider is whether the structures used by the defendant county, in its jail, are an infringement of the May invention. But, in view of the discussion at the bar, I desired counsel to fully understand the view which the court takes of the patent, and of the patentability of this invention. If, then, you find that in all or either of the claims here in question, namely, the first, third, and fourth, the defendant has been guilty of infringement as charged, then the plaintiff should have a verdict. If you find that neither of the claims was infringed, then the defendant should have your verdict. What constitutes an infringement in a case like this is so well defined in a charge of the court to a jury in a reported case I have before me, that I read to you from the printed volume:

"An infringement takes place whenever a party avails himself of the invention of the patentee without such variation as will constitute a new discovery. An infringement involves substantial identity, whether that identity is described by the terms, 'the same principle,' 'same *modus operandi*,' or any other. It is a copy of the thing described in the specifications of the patentee, either without variation, or with only such variations as are consistent with its being, in substance, the same thing. No certain, definite rule can be stated

by which to determine unerringly, in every case, what will amount to substantial identity. The jury, guided by general principles, must determine each case upon its own circumstances. If, however, the invention of the patentee be a machine, or an improvement on a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism which performs the same service, or produces the same effect, in the same, or substantially the same way. The question is whether the given effect is produced substantially by the same mode of operation, and the same combination of powers and devices in both machines. Mere colorable or evasive differences cannot defeat the right of the original inventor. The inquiry, therefore, should be whether the defendant's device is, in substance and effect, a colorable evasion of the plaintiff's contrivance, or whether it is really a new and substantially different thing. If the defendants have taken the same general plan, and applied it for the same purpose, and produced the same effect, in substantially the same mode, although they have varied the form or construction merely, it will still be, substantially, in contemplation of the patent law, the same thing; otherwise it will not. Whether or not one machine is an infringement of another, therefore, does not necessarily depend upon whether the mechanical constructions are different; but the question is whether, whatever be the mechanical construction, the latter machine contains the means or combination found in the previous machine; whether, taking the structure as you find it, you see the new idea completely embodied in it. * * * If the defendants have only varied their combination by employing well-known mechanical substitutes for some one or more material elements or parts of the plaintiff's combination, then there is an infringement; for a mere known mechanical substitute for a thing, for the purpose of determining the question in issue, must be regarded as the thing itself. * * * When, in mechanics, one device does a particular thing, or accomplishes a particular result, every other device known and used in mechanics, which skillful and experienced workmen know will produce the same result, or do the same particular thing, is a known mechanical substitute for the first device mentioned, for doing the same thing or accomplishing the same result, although the first device may never have been detached from its work, and the second one put in its place. It is sufficient to constitute known mechanical substitutes that when a skillful mechanic sees one device doing a particular thing, that he knows the other devices, whose uses he is acquainted with, will do the same thing."

Now, within these definitions, does the structure used by the defendant infringe the May device? In their general scope and object they seem to be quite alike, and are evidently intended to secure the same result. Do they differ essentially in their organization or mode of operation? The one is evidently equivalent to the other, as producing the same result. But in this sense it is not material to consider the subject. The question is whether the defendant has used substantially the same means, or, mechanically speaking, equivalent means, to accomplish the same result. If it has, it is an infringer; otherwise not; and whether it has or not is a question for the jury to determine. As we have seen, a mechanical equivalent, as generally understood, is where one may be adopted instead of the other, by a skilled mechanic, accustomed to machinery, with a competent knowledge of mechanical powers. If such a man, seeing a new machine, and having a full description of the thing invented, can, by examin-

ing it with care, see that the required thing can be done in a different mode, and it is done in that different mode by the knowledge which he has of his business, he has not produced a new invention, nor one substantially differing from the original. But if the inventive faculties are exercised to produce the change, then he has a right to the benefits of whatever he thus invents. There must be invention involved in the change, and not the mere skill of the workman, to avoid the consequences of an infringement. The question here is, does the structure used by the defendant substantially embody May's mode of operation, and thereby obtain the same results as were reached by his invention? It is not necessary that the result should be precisely the same in degree, but it must be the same in kind. For instance, shutting one door instead of two is a difference in degree, but not in kind; the same function is performed.

Now, keeping in mind that the May invention consists of certain mechanical means which enable the jailer, from the moment he enters the outer door, to control the prisoners, by fastening the corridor doors while separated from them, the question is, do the means employed by the defendant in its jail infringe them? Has the defendant used the plaintiff's invention, or something substantially like it? Do the structures operate upon the same principle? If there are differences, are they or not mere differences in form, producing the same result? The plaintiff's invention secured to the inventor not only the particular means described in the patent, but all other mechanical contrivances which are equivalents. When these mechanical arrangements are thus compared and analyzed, if differences be found, it is for you to determine whether these differences are substantial, or are only formal and evasive, arising from employing in the defendant's jail, in the place of those specific parts or devices of the May combination, other known mechanical substitutes therefor. If *substantial*, then there is no infringement; but if merely formal or evasive, and not substantial, there is an infringement.

The testimony of the expert which has been introduced you are to consider like any other evidence. You are to try it by the same tests that you apply to the evidence of other witnesses, and give it just such credit and weight as you deem it entitled to from all the circumstances, and no more. You have the models before you, and these, I think, are readily comprehended. The undisputed evidence shows, I think, a fixed royalty of \$50 for each cell, at which the plaintiff's device, or the right to use it, was sold by the patentee in his lifetime. In such a case it is the ruling of the courts that such royalty constitutes the proper measure of damages. If, therefore, you find the plaintiff entitled to recover, you will allow her damages at the sum of \$50 for each cell in the Fond du Lac jail on which the invention was used prior to October 4, 1880, and subsequent to October 4, 1873. If there were 34 cells upon which it was used, the total amount would be \$1,700; and if you find for the plaintiff, you may

allow to her interest upon the gross sum at 7 per cent. from September 29, 1885. I have drawn forms of verdict, gentlemen, which I will allow you to take; and if you find for the plaintiff, we will ask you to state which of these claims you find are infringed. You understand that if you find all these three claims, or either of them, infringed, then your verdict must be for the plaintiff. If you find that neither of the claims is infringed, your verdict will be for the defendant; and the court will ask you to state in your verdict, in the manner indicated in the form of verdict which the court will hand to you, what you find as to infringement of the claims.

Verdict finding infringement of each of the three claims in suit.

KEARNEY and another v. LEHIGH VAL. R. Co.¹

(Circuit Court, D. New Jersey. June 3, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—PARTIES—PLEADING—ESTOPPEL.

To support a plea in abatement for non-joinder of parties in a suit for infringement of a patent, defendant offered in evidence a written certificate given by plaintiffs to a third person, and reciting that such person had "one-third equal interest with ourselves in the said patent." Defendant urged that plaintiffs were estopped from showing by parol that the writing did not state the agreement and intention of the parties. *Held*, that this was not a case for the invocation of the doctrine of estoppel.

2. SAME—ASSIGNMENT—NOTICE.

The bill of complaint in this case was filed March 15, 1883, by plaintiffs, claiming to be the sole owners of the patent sued on and all rights under it. On May 10th following, defendant procured an assignment of the patent and a release of infringement claims from one who claimed an interest. *Held*, that defendant was a purchaser with notice, and was subject to all the equities that could be invoked against its assignor.

3. SAME—ASSIGNMENT.

A certificate given by patentees, which recited that the party to whom it was given had "one-third equal interest with ourselves in the said patent," *held* not an assignment of the patent, or any part thereof; the evidence showing that it was not intended by the parties giving it to operate as an assignment.

Andrew McCallum, for complainants.

Elwood C. Harris, for defendants.

NIXON, J. The bill of complaint was filed in this case by Francis Kearney and Mary F. Tronson, as executrix of Luke F. Tronson, deceased, against the defendant corporation, for an injunction, and for the recovery of profits and damages for the alleged infringement of reissued letters patent No. 5,184, for new and useful "improvements in spark arresters for locomotives." The defendant has put in a plea in abatement of the suit, for the non-joinder of parties, alleging that

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

at the time of the commencement of the action, and prior thereto, the complainants were not the sole and exclusive owners of said letters patent, and that one John H. Immer, of Newark, New Jersey, had an equal undivided one-third interest therein. In support of the plea the defendants offered in evidence the following written certificate, executed on the day of its date, duly received for record, July 2, 1873, and recorded in Liber V. 16, p. 289, of Transfers of Patents:

"To whom it may concern: This certifies that John H. Immer is fully authorized and empowered to make any contract with the Central Railroad of New Jersey, that may be binding on our part, for the sale of the patent-right on spark arrester, as secured to us by letters patent 113,528, dated April 11, 1871, and reissue 5,184, dated December 10, 1872, he having one-third equal interest with ourselves in the said patent.

[Signed]

"F. KEARNEY.

"LUKE F. TRONSON.

"Newark, April 10, 1873."

The counsel for the defendant insists that the paper constitutes an equitable assignment of the one-third ownership in the reissue; that it is a writing free from all ambiguity; and that the complainants are estopped from showing by parol such was not the agreement and intention of the parties. But it does not seem to be a case for the invocation of the doctrine of estoppel. The facts are substantially as follows: Kearney and Tronson obtained the original letters patent on April 11, 1871, for a new improvement in spark-arresters; and, being desirous of bringing the invention into general use on the railroads of the United States, they entered into an agreement with one John H. Immer on April 5, 1872, in which they constituted him their sole agent to sell patent-rights for the period of one year, at the rate of \$50 for the use of said improvement upon each engine to which it should be applied; and they further agreed that Immer should be authorized to retain 25 per cent. of all moneys received by him in said sales, for his full and complete compensation, and should pay to the patentees the remaining 75 per cent. During the continuance of this contract the parties came to the conclusion that the claims of the patent were not broad enough to fully cover the invention, and a surrender and reissue was deemed necessary. The patentees not having the means to pay the required fees, it was agreed that Immer should have his rate of compensation changed from 25 per cent. to $33\frac{1}{3}$ per cent. of the proceeds of the sales of patent-rights, on the condition that he should pay the costs of the reissue. The reissue was obtained on December 10, 1872, and he made the necessary payment of fees; but no change was formally introduced into the written agreement. It expired April 5, 1873. A few days afterwards Immer called upon Kearney with the above paper or certificate, stating that he wanted authority to settle the claim for infringement which they had against the New Jersey Central road, and that he had drawn the paper to show to the officers of the road that he was authorized to make the settlement, and at the same time to express the

new arrangement as to his compensation, which had been agreed to. With this explanation of its meaning, Kearney and Tronson signed the certificate, and there is no evidence that Immer ever gave any other construction to it, or made any claim to ownership in the patent, until after this suit was brought, unless the assignment of the one-third of said patent by Immer to one Annan on April 28, 1874, and the reassignment of the same by Annan to Immer on June 23, 1875, be construed to indicate such claim.

The bill of complaint in this cause was filed March 15, 1883, by Kearney and the executrix of Luke F. Tronson, claiming to be the sole and exclusive owners of the patent. It was after this date that any notice came to the defendant that Immer set up any claim to ownership in the patent. On May 10, 1883, he assigned to the defendant corporation all the right to the reissue, and added a special release and discharge for all claims for damages for any prior infringement. The defendant, therefore, was a purchaser with notice that complainants denied the claim of Immer to ownership in the letters patent, and it is subject to all the defenses that could be set up against Immer himself. The certificate was not an assignment of the patent, or the part thereof; and, judging from its form, it was not intended by the parties to be so regarded. Whether its use should be limited to the settlement of the claim against the New Jersey Railroad it is not necessary to determine, although that seems to be its fair import. It is clearly competent, however, for the complainants to set up the same defense against the claim of ownership by the defendant corporation as they could have set up against Immer; and the testimony satisfies me that, when the patentees signed the certificate, they understood the scope and meaning of the paper to be that Immer should be entitled to receive the one-third, instead of the one-fourth, as before, of the money realized on the sale of patent-rights.

This construction of the certificate does not invest Immer or his assignee with any title, legal or equitable, in the patent itself. It simply determines the rate of compensation to which he was entitled on sales of patent-rights. I am aware that the phraseology used is capable of different construction; but I regard any other construction as aiding Immer in his attempt, by deception, to get more than the patentees intended he should have.

There must be a decree in favor of the complainants, on the plea.

ROEMER *v.* PEDDIE and others.¹SAME *v.* HEADLEY.

(Circuit Court, S. D. New York. June 3, 1886.)

1. PATENTS FOR INVENTIONS — NOVELTY — LOCK AND HANDLE FOR TRAVELING BAGS.

Letters patent No. 195,233, of September 18, 1877, to William Roemer, for improvement in combined lock and handle for traveling bags, *held valid*; following *Roemer v. Simon*, 20 Fed. Rep. 197.

2. SAME—ACCEPTANCE OF NARROW CLAIMS.

A patentee is bound by his claims. If he acquiesces in a rejection of broad claims, and accepts claims for his specific construction, he cannot be heard to enlarge the scope of his patent by construction, so as to cover devices not within its terms.

3. SAME—CONSTRUCTION OF CLAIM.

This patent construed, and *held* limited to the patentee's particular construction, and not infringed by defendant's lock-case, which had an extended bottom plate; the patentee having amended his application so as to dispense with a bottom plate.

In Equity.

Sanford H. Steele, for orator.

J. E. Hindon Hyde, for defendants.

WHEELER, J. This patent was held valid in *Roemer v. Simon*, 20 Fed. Rep. 197. No good reason for changing that conclusion has been made to appear, and it is followed now. The only question left is whether the defendants infringe. The improvement patented consists essentially in extending the sides of the lock-case to hold the handle rings of traveling bags. The bottom plate of the lock had before been extended for that purpose. By the improvement the bottom plate could be dispensed with, and the side walls of the lock-case made both to inclose the lock and hold the handle rings. The defendants use the same thing to hold the handle rings, but place the lock above it, and do not use it for the side walls of the lock-case. It becomes, by the use which they make of it, an extended bottom plate to the lock, of an improved form. If this piece was patented, and the patent is valid to cover it, the defendants do infringe. The file-wrapper and contents are made a part of the case. From them it appears that the orator, in his application for this patent, at first applied for a patent covering the combination of the lock-case with the handle rings. His claim was rejected on a reference to patent No. 177,020, granted to William Simon, which covered an extended bottom plate to the lock, to hold the handles. The claim was amended, and again rejected on the same reference, and was not granted until the specification was amended to dispense with an extended bottom plate to the lock, and the claim was confined to a

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

lock-case with notched sides near its ends, to receive and hold the handle rings. This piece, which the defendants use, was the same before as after these amendments. The patent-office would not grant a patent for it generally in combination with the handle rings, but only specifically when used for the sides of the lock-case and for the handle rings. The orator accepted the patent narrowed in that manner, and cannot now be heard to claim that it is any more broad than that in its scope.

He invented this particular form of lock-case, and his patent is for that only, and it cannot be construed to cover anything else. *Railway Co. v. Sayles*, 97 U. S. 554. The defendants do not use his lock-case, but use an extended bottom plate like his lock-case. It has been argued ingeniously and with plausibility that the same thing is used under a merely different name; but this argument is not in reality well founded. The patent was for a lock-case, not only in name, but in substance. The defendants do not use this lock-case. They evade the patent, not by a mere colorable, but by a substantial evasion.

Let decrees be entered that the defendants do not infringe, and that the bill be dismissed, with costs.

STEAM-GAUGE & LANTERN Co. and another v. FOLLETT LANTERN & MANUF'G. Co.¹

(Circuit Court, N. D. New York. June 11, 1886.)

PATENTS FOR INVENTIONS—INFRINGEMENT—TUBULAR LANTERNS.

Letters patent No. 104,318, of June 14, 1870, and No. 151,703, of June 9, 1874, to John H. Irwin, sustained, and defendants held to have infringed the first claim of the former, and the second claim of the latter.

Edwin S. Jenny, for complainant.

Albert H. Harris, for defendant.

COXE, J. It is unnecessary to add anything to the views expressed upon the argument, further than to say that I have examined with care the two patents to which my attention was particularly called, granted, respectively, to Holden and Giajola. I see no reason to alter the opinion then intimated. It is suggested that these patents were not fully considered by the court in *Steam-gauge & Lantern Co. v. Miller*, 21 Fed. Rep. 514. Even though this were so, it is not easy to see, as an original proposition, how a construction can be given them favorable to the defendant's theory. But it is entirely clear that the court in that case did give due consideration to all limiting

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

and anticipating references. The following quotation will serve as an illustration :

"Previous structures had supply tubes, which returned vitiated air to the burner, or which furnished fresh air from protected chambers, or which furnished whatever fresh air would enter through an open funnel or bell mouth; but no previous structure furnished fresh air by the aid of injectors, which compelled air, which would otherwise strike the lantern in such a direction as to exhaust the tubes, to enter the tubes in a continuous and irreversible current."

The open funnel or bell-mouthed structure here mentioned unquestionably refers to the Holden device. It is safe to assume, from the character of the counsel who argued that cause, and the judge who decided it, that nothing was overlooked or slighted.

The defendant infringes the first claim of No. 104,318, and the second claim of No. 151,703.

The complainant, as to these claims, is entitled to the usual decree for an injunction and an accounting.

THE COLUMBIA.¹

THE ALASKA.

VAN PELT and others v. THE ALASKA.

(District Court, S. D. New York. May 17, 1886.)

1. COLLISION—STEAM-SHIP AND PILOT-BOAT—PILOT BOARDING STEAM-SHIP—DUTY OF STEAM-SHIP AS TO SPEED AND HELM.

It is the duty of a steam-ship, when about to take on board a pilot at sea, to come to a substantial stop; *i. e.*, to reduce her headway to the minimum speed required to keep her in position. She should not adopt a veering course, calculated to thwart the maneuvers of the pilot-boat as the latter approaches, but come as near to a stop as possible, and leave the rest to the pilot-boat.

2. SAME—DUTY OF PILOT-BOAT—NIGHT—GALE—HAZARDOUS METHOD—CUSTOM.

The pilot-boat in this case attempted to launch her yawl when ahead of the steam-ship, so that it should go down the latter's lee side, while the pilot-boat crossed the steamer's bow, to go down her windward side, and round under her stern, to pick up the yawl. *Held*, that no such invariable custom was proved of boarding vessels in that manner as to excuse the pilot-boat for attempting it at night, and in a gale which rendered that method hazardous and unjustifiable.

3. SAME—EVIDENCE—ONE-SIDED STORY—IMPROBABILITIES—SPEED.

In a case of collision where all upon one vessel are lost, the narrative of the other, considering the natural bias of the witnesses, should be received with caution, and not adopted beyond what is consistent, rational, and probable. In this case the steamer's claim of low speed critically examined and disallowed, upon the other circumstances proved, and upon the insuperable difficulties and improbabilities in navigation that such low speed would involve.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

4. SAME—LIEN NOT LOST BY REASONABLE DELAY—CHANGE OF OWNERSHIP OF LIBELED VESSEL—NOTORIOUS ACCIDENT—DILIGENT INQUIRY.

Though a libel for collision had not been filed at the time of a change of ownership of the vessel, *held*, on suit subsequently brought, that, as the accident was so notorious that the possibility of claims arising therefrom could not have escaped reasonably diligent inquiry on the part of the purchaser, the vessel was not discharged; the delay of 11 months in filing libel was not unreasonable.

5. NEGLIGENCE—DEATH ON HIGH SEAS—LOSS OF SUPPORT—RIGHT TO RECOVER IN ADMIRALTY.

The pecuniary loss sustained by persons who have a legal right to support from one who has lost his life through the wrongful conduct of vessels on the high seas may be recovered in admiralty.

6. COLLISION—STATEMENT OF CASE.

The pilot-boat *Columbia*, after an exchange of signals, attempted to board the steam-ship *Alaska* about midnight, in a moderate N. W. gale, by crossing the bows of the steamer, so as to launch her yawl ahead of the latter, and then get away. In the act of launching her boat she was run down and sunk by the *Alaska*. The evidence indicated that at the time of collision the speed of the *Alaska* was about four knots, and, under the captain's orders to keep the pilot-boat two points on the steamer's port bow, the helm of the *Alaska* was kept to port so that her head continually veered to starboard, as the pilot-boat attempted to cross ahead of the steamer to the latter's starboard side. *Held*, that the steamer was in fault for her speed and constant veering, and the pilot-boat for attempting such a method of boarding, which was not justifiable in a gale, if ever justifiable at night.

In Admiralty.

Whitehead, Parker & Dexter, for libelants. *James Parker*, advocate.

Wilcox, Adams & Macklin, for claimants.

BROWN, J. At a little past 12 o'clock on the night of December 2, 1883, when the steam-ship *Alaska*, bound for New York, was about 12 miles S. S. E. from Fire Island light, the pilot-boat *Columbia*, in preparing to put a pilot on the *Alaska* in answer to her signal, was run down and sunk, and all on board perished. The libel and supplemental libel were filed by the representatives of the principal owners of the *Columbia*, and by the personal representatives of four pilots and the cook, who were on board at the time of the accident, and by the widows of the pilots and of the cook, to recover for the loss of the pilot-boat, the loss of personal effects, and for the loss of support. The circumstances proved are sufficient to identify the boat run down by the *Alaska* as the pilot-boat *Columbia*. Neither the boat nor the men were ever heard from afterwards, and the pilots and the cook named in the libel and supplemental libel are proved to have been aboard. All the evidence in the case as to the circumstances of the disaster is derived from the officers, seamen, and passengers on board of the *Alaska*. The principal facts are as follows:

At 11:40 P. M., the *Alaska* then heading about W. by N., the pilot-boat's torch was observed bearing about S. W. The steamer answered with a blue light, indicating that a pilot was desired. The helm of the *Alaska* was thereupon starboarded, so as to approach the pilot-boat, until she headed W. by S. $\frac{1}{2}$ S., when her helm was steadied. The wind was blowing a gale from N. W. The night was dark,

but not thick. The pilot-boat shaped her course to the northward and eastward, so as to intercept the course of the steamer, and at the proper time to launch a yawl, as customary, to carry the pilot to the steamer's side. A ladder and light were placed at the steamer's gangway on the port side, which was the lee side, as a signal to the pilot where he would be received. This was about 200 feet abaft the stem. When the Alaska steadied at W. by S. $\frac{1}{2}$ S. the pilot-boat bore about two points off the Alaska's port bow. The master ordered the helmsman to keep the pilot-boat at least two points off the steamer's port bow, and to mind his port helm accordingly. Under these directions, as the pilot-boat hauled to the westward, the Alaska's course was correspondingly changed until at 12:06 she headed W. $\frac{1}{2}$ S., and at the time of the collision, about 12:10, she headed, as the wheelsman testifies, W. $\frac{1}{2}$ N., nearly her original course.

When the pilot-boat was first sighted, and for some 12 minutes afterwards, the Alaska was making about 14 knots per hour. Her speed subsequently, and at the time of the collision, is one of the controverted questions in the case. The narrative of the log is as follows:

"At 11:40 observed pilot-boat's torch bearing S. W.; 11:52 proceeded half speed. At 11:57 proceeded slow. At 12:06 stopped engines, ship's head being W. $\frac{1}{2}$ S., pilot-boat's light bearing about S. W. by W. $\frac{1}{4}$ W. At 12:08 observed the pilot-boat attempt to cross our bows. Reversed engines full speed, and in about two minutes she came into collision with our stem, sinking almost immediately. 12:13 stopped engines, and used every means of saving life with life buoys, lines, and also sending away a boat at 12:20. Cruised about in the vicinity of the disaster until daylight; then steamed around with a lookout at the mast-head, and, seeing nothing, proceeded on our course at 7:30."

The entries in the engineer's log agree with the above. The evidence of the pilots and others, called as experts, showed that there are three different methods pursued by pilots intending to board steamers when approaching in front of them in a strong head-wind. The first is for the pilot-boat to sail down into the lee of the steamer, and there launch her yawl, as Capt. Murray expected would be done in this case; the second, for the pilot-boat to sail across the steamer's bow, pass down on her windward side, wear around her stern, and launch the yawl as she comes up on the steamer's lee quarter; third, to launch the yawl ahead of the steamer, so as to let the yawl go down upon her lee side, while the pilot-boat crosses her bows, and goes down to windward, and rounds her stern to pick up the yawl. The latter was the course pursued in the case of *The City of Washington*, 92 U. S. 31, and the course manifestly intended by the pilots in this case. One of the most experienced pilots called as an expert testified that the proper course for the steamer, after signaling the pilot, under circumstances like the present, is to make towards the pilot-boat, and come substantially to a stop,—that is, not exceeding half a knot or a knot an hour, when off the pilot-boat's lee bow, and

a few hundred feet distant; and that in that situation the pilot-boat may properly pursue either of the last two methods; but that the latter is not prudent or justifiable at night, in a strong wind, when the steamer is evidently in motion, and when her two colored lights have not been seen, and she appears to be keeping off to windward. The last two methods are deemed preferable to the first as a general rule, because the pilot-boat is thereby better enabled to keep clear of the yawl, and to keep control of her own motion. 92 U. S. 40.

Although both these latter methods have been long practiced by pilots, the master of the *Alaska* testified that he had never before known such an attempt at night. His testimony, and that of the officers of the *Alaska*, leave no doubt that the pilot-boat was expected by them to sail down upon the lee side of the *Alaska*, and there launch her yawl; and that it was not until the *Alaska's* engines were reversed at 12:08, "about two minutes," as the log says, before the collision, that the officers of the *Alaska* had any idea that the pilot-boat was intending to cross her bows. Their account of the disaster is, and the answer states, that immediately before the order to reverse was given, the pilot-boat, being then two points on the *Alaska's* port bow, was observed suddenly to close in rapidly across the steamer's course, when apparently only a short distance ahead. It is supposed that the pilot-boat then luffed into the wind, so as to reduce her speed, for the purpose of launching the yawl. Her previous speed is estimated at some seven or eight knots. The carpenter testified that he saw the pilot-boat suddenly luff when within 50 or 100 feet of the *Alaska's* stem, and that he then saw, as he thought, one end of the yawl resting upon the pilot-boat, and the other end in the water; which, if true, would indicate that something unusual had happened in attempting to launch the yawl. The hull of the pilot-boat, after striking the steamer's stem, was not again seen. It began to sink immediately, and passed along the starboard side of the steamer. The master ran down the ladder from the bridge, and saw from the starboard rail only the light, the mast, and the peak of the pilot-boat's sail above water; and she disappeared altogether when about amid-ships. The yawl was capsized, and passed along the steamer's port side. Several men were seen clinging to it, and were heard calling for help. Another man near it was clinging to a spar. The lines thrown out to the men from the steamer failed to reach them as they passed astern, and none were afterwards found.

On the part of the steamer the contention is that her headway was substantially stopped; that the pilot-boat, upon luffing, and while waiting to repair the supposed accident that happened to the yawl, was blown against the starboard bow of the steamer by the strong wind, upset, and stove in. The libelants contend that the steamer was under considerable headway, and ran upon the starboard quarter of the pilot-boat while she was engaged in launching

her yawl, and cut her in two, before the pilots, who had a right to suppose the steamer to be stopped, or nearly so, discovered their mistake.

The case, in many of its aspects, resembles that of *The City of Washington*, 92 U. S. 31, in which the respective duties of the steamer and the pilot-boat were fully and carefully discussed. In that case, as in this, the steamer was bound for New York, and the wind was strong from the north-west. The pilot-boat, however, approached from the northward instead of from the southward. The City of Washington, after first porting her helm so as to approach towards the pilot-boat, when the latter was near to the line of the steamer's course, starboarded her helm so as to turn her bows somewhat to the southward, towards the direction in which the pilot-boat was moving. In these respects the two cases are perfectly analogous. An examination of the "Apostles" also shows that in that case, as in the present, the engine had been first slowed, and then reversed full speed; and it was claimed there, as here, that the quick-water of the reversed propeller had reached amid-ships before the collision. The court found the steamer in fault for not sufficiently stopping her headway, and for starboarding so as to put herself in the way of the pilot-boat's crossing her bows. The court also found upon the proofs that the crossing of the steamer's bows was justified by the custom of pilot-boats, and was not a fault on the part of the pilots. In the district court, (6 Ben. 138,) BENEDICT, J., said, (page 140:)

"The starboarding is admitted in the answer, and, under the circumstances disclosed by the evidence, I consider it negligence. The course of the pilot-boat was known to be crossing that of the steam-ship, the breeze was fresh, and it was known to the steam-ship that, at her request, the pilot-boat was endeavoring to place a pilot on board her. This maneuver the pilot-boat was entitled to be permitted to accomplish without embarrassment from the steamer. Certainly the steamer, by starboarding and giving herself a course across the course of the pilot-boat, while the yawl, which was to be picked up by the boat after the pilot was placed on the steamer, was in the act of passing to the steamer, attempted a maneuver which cast upon her the risk of its success. I think, also, that it was the duty of the steamship to stop still before she reached the pilot-boat; instead of which she was kept moving ahead,—slowly, it is true, but yet with a momentum which, with the starboarding, brought her upon the pilot-boat, and sank her."

In the circuit court, (11 Blatchf. 487,) WOODRUFF, J., said, (page 488:)

"The steamer was in fault in not slowing, and, if necessary, stopping, at an earlier moment, and before coming into such dangerous proximity to the sailing vessel. Indeed, upon the proofs, it was the duty of the steamer to stop to receive the pilot attempting to board her in the night season."

The supreme court confirm these positions. 92 U. S. 38-41.

The same faults are charged upon the Alaska in this case that were established against the City of Washington, viz.: (1) Failure to

stop sufficiently; and (2) veering, up to the last moment, across the pilot-boat's course. That the Alaska did turn to the northward about a point during the last three or four minutes is shown by the log and the testimony; but I am of opinion that this would have been immaterial had the speed of the Alaska for a minute before the collision been reduced to the minimum consistent with holding her position,—say to half a knot, or even a knot, an hour. The libelants' evidence shows that that reduction of speed is regarded, even by pilots, as a substantial stop, and all that is required. In this case, therefore, the fault of the Alaska turns mainly, if not wholly, upon the question of her speed during the two or three minutes before the collision. If she was under a headway of several knots, that speed, and her veering to the northward, were both material faults, which combined brought about the collision.

Repeated consideration of all the evidence has failed to satisfy me that the Alaska, at the moment of collision, had come to a stop, or to a speed not exceeding half a knot or a knot an hour, *i. e.*, the minimum headway sufficient to keep her in position. On the contrary, I am satisfied from some direct testimony, and from many circumstances of the case, that she was going at least four knots, and that the best-established facts of the case cannot be reconciled on any other view.

On the part of the libelants, the principal direct evidence of considerable headway in the Alaska, up to the moment of collision and afterwards, is derived from the testimony of several witnesses, who testify that, within a few seconds after the collision, parts of the wreck were seen near the bridge, some 200 feet aft of the stem, passing astern at considerable speed. Mr. Worcester and Mr. Challoner, two highly intelligent and competent passengers, who saw the capsized yawl and the spar, and the men clinging to them, estimate that they went astern along the side of the ship at the rate of six or seven knots. Mr. Worcester says it was about 10 seconds, and could not have exceeded 20 seconds, from the jar of the collision to the time when he was at the port rail near the bridge, 200 feet from the stem, and saw the capsized yawl and spar about abreast of him, and perhaps 50 feet from the steamer's side; and Mr. Challoner, who saw the same from the port quarter, confirms this estimate. On the starboard side the sinking mast, and the light, and the peak of the sail, were seen by the master and by the purser at about the same distance from the stem. The master estimates the time to have been about a minute and a half after the collision; but no such interval is accounted for by any acts of his in the mean time. It is not probable that an energetic and alert commander like Capt. Murray would wait any considerable interval before stepping a dozen paces to the rail to see what was happening to a sinking vessel along-side. The purser says the interval was not over five seconds after he felt the slight jar of the collision, when, rushing from his room, he reached the rail to see what was the

matter. The second officer, standing on the port side, 75 feet from the stem, felt the collision; and he testifies that he saw the capsized yawl abreast of him, with two men on it, "almost immediately" after. These witnesses state just what they did between the moment of collision and seeing those parts of the wreck abreast of them. While the precise number of seconds is not pretended to be stated accurately, the time it took for the wreck to reach the bridge, if they tell the truth as to what they did and saw, must have been short,—apparently not over one-third of a minute at most. This would indicate six knots as the combined motion of the drift and of the Alaska's headway. Besides this direct evidence, there are several other circumstances indicating considerable speed in the Alaska, to which I shall presently refer.

The evidence that the steamer was stopped, or nearly so, is derived (1) from computations showing that from the length of time that the engines were at "half speed," and "slow," and "stopped," and "reversed," as stated in the log, and from the number of revolutions at "half speed," and "slow," as stated by the engineer, there could not have remained any headway at the time of collision; (2) from the testimony of a number of the officers and men, who say that, in their judgment, the Alaska was stopped, and had sternway on at the moment of collision; (3) from their testimony that the wreck when seen abreast was going only *slowly* astern; (4) that the quick-water from the propeller was at the same time seen amid-ships, indicating a complete stop. The passing of the wreck astern is ascribed by the claimant's witnesses solely to drifting in the high wind and sea.

In considering the weight of proof in support of these views, the libelants are entitled at the outset to the benefit of the natural probabilities arising out of the circumstances of the case. Pilots are among the most skillful seamen in the world. These were trained and experienced men. The Columbia was schooner rigged, but 88 feet long over all, and capable of being maneuvered with great quickness and dexterity. It is improbable, in a high degree, that if the Alaska were substantially stopped, or moving at the rate of half a knot only, the Columbia, in launching the yawl ahead of her, with a full complement of skillful seamen, should either have sailed down, or been suffered to drift down, upon the Alaska's bow while the latter was at rest. This is so improbable as to be almost incredible, unless she were disabled. Mere difficulty with the yawl could not account for it, and her filling away just before she was struck shows that she was not disabled.

Again, the natural bias of the Alaska's officers and men in her behalf cannot be disregarded. Constant experience illustrates the effect of this influence, however upright the intentions of the witnesses. Where the narrative of both sides is heard, its effect may be said to be neutralized; but where the lips of all on one side are closed, great caution is obviously necessary. When all on one vessel

are lost, it is not too much to require that an account derived wholly from the other shall be in its essential features consistent, rational, and probable; and that, in so far as it involves serious departures from these conditions, it should not be accepted, unless sustained by proof about which there could be no mistake.

The effect of this natural bias is apparent, I think, throughout the claimants' case. A single entry in the log illustrates the subsequent changes that the same matter undergoes in the testimony. The log says: "At 12:08 observed the pilot-boat attempt to cross our bows. Reversed engines full speed, and in about two minutes she came into collision with our stem, sinking almost immediately." This entry was made shortly after the occurrence; even then presumably not wholly free from the tendency to excuse the ship. The expression adopted, "in about two minutes," there naturally signifies "nearly two minutes," or between one and two minutes. But on the trial all the officers, except the master, who in his first statement calls it two minutes, call the interval *three* minutes. Again, the time of collision is not stated, evidently because the clock was not at that moment observed; but on the trial the third officer says he did observe the clock, and that it was 12:11, *i. e.*, making just the three minutes. But if the time had been observed to be three minutes, that would certainly have been stated in the log, as most favorable to the ship. Considering that the various other entries are made according to the time by the clock, it is highly improbable that 12:11 should not have been entered if it had been observed. Again, the log says the collision was with the *stem*; the answer and the testimony represent it as with the starboard bow, and not with the stem, —an important difference in several relations. Again, there is no intimation in the log of any change of course by the pilot-boat, nor of any *sudden* direction across the Alaska's bows. The pilot-boat's course was from the first necessarily directed across the Alaska's bows. It was known to be so, because she wished to intercept the steamer. She was expected, however, to haul down upon the steamer's lee side when she had approached near. Instead of doing as expected, she kept her course, as the log naturally imports, and tried to cross the Alaska's bows; but in the answer and the testimony we have a "change of course," a "sudden luff," a "sudden closing in" of the light. In the log nothing of this kind is intimated. As respects each of these four particulars in a single entry, the officers were fully as able to state accurately, and quite as likely to do so, when they made up the log as afterwards. I must regard the log as the best evidence, where special reasons do not appear for departing from it.

1. The Alaska's narrative as respects the occurrences of the few minutes preceding the collision, and her claim that her headway was then either fully stopped, or reduced to the minimum of half a knot, involve so many improbabilities, difficulties, and inconsistencies, as to prevent its acceptance.

(a) Her witnesses say that at 12:08, two or three minutes before the collision, according to their reckoning, there was a sudden luff by the pilot-boat,—a sudden “closing in” of her light across the Alaska’s bow. Most of them say that this took place when the pilot-boat was only 50 or 100 feet distant. The master and some of the officers call it 250 feet. The third officer, in one passage, calls it 500 feet. All, however, agree that when the light suddenly closed in the pilot-boat bore about two points off the Alaska’s port bow, as she had done all along. No one estimates the speed of the pilot-boat in approaching the Alaska at less than seven knots, until her supposed luff. In luffing to launch the yawl, pilot-boats do not come to a stop, but only check their speed. When her light was seen to be suddenly “closing in,” her course must necessarily have been directed across the Alaska’s course, and at first her speed would be but slightly checked. Bearing less than two points off the port bow at 12:08, (because closing in rapidly,) if not then over 500 feet distant, she would have had less than 200 feet to travel; and she would therefore have crossed the Alaska’s track in much less than a minute,—if only 100 feet off, in less than 10 seconds. But the interval sworn to is three minutes,—the log says “about two minutes.” If it be said that the pilot-boat might have come to a stop when ahead of the Alaska, on account of the supposed mishap with the yawl, it is incredible—whether such an accident happened or not—that the pilot-boat should have lain still until the Alaska ran over her, or until she had drifted down upon the Alaska’s stem with the latter at rest. But the evidence does not admit of any such stop; for the passage of the light across the Alaska’s course must in that case have stopped also, and that fact would have been noticed. The evidence indicates that the light, without stopping, drew directly across the Alaska’s bows until the moment of collision.

(b) That the pilot-boat had been kept about two points off the Alaska’s port bow until she closed in to less than two points at 12:08, is one of the most certain parts of the claimants’ evidence. But bearing less than two points at 12:08, the pilot-boat, in order to reach the place of collision, had much less distance to travel than the Alaska. Whatever the pilot-boat’s speed, the Alaska’s must have been considerably greater. Whether the interval of time after closing in was more or less than two minutes, the pilot-boat’s speed, as she did not stop, could not have been less than two or three knots, and if she luffed “suddenly,” it must have been more. The necessary inference is that the Alaska’s speed exceeded that.

(c) The supposed accident to the yawl is not sustained by sufficient evidence to be accepted as a fact. It is supported by the testimony of the carpenter, Duffy, only. Of the half a dozen other men whose business it was to watch the Columbia, and who were watching her, not one saw the yawl. Duffy was not watching her, but as he looked out of the port bow to take the draught, he says he saw the Columbia luff about 50 or 100 feet off, show her side, and the yawl with one

end in the water. He did not remain at the bow, but went away. He estimates this as from five to ten minutes before the collision, and tells what he did in the mean time. If the interval was one-quarter of his estimate, the Columbia must have been at least several hundred feet away, and he could not have distinguished in the night-time any such peculiar situation of the yawl upon a small schooner like the Columbia. It is certain that the Columbia did not luff so as first to show her side when within 50 or 100 feet of the Alaska; and if she had done so when only two points off the Alaska's port bow, she would have shot like an arrow across the Alaska's path. The close proximity of the Columbia is a necessary condition of any probability in Duffy's story; and the other particulars stated by him, as well as by others, disprove any such close proximity. His cross-examination shows the weakness of his testimony. The supposed accident to the yawl is immaterial, except as a clue to explain the delay of the pilot-boat in getting out of the way. But if the Alaska was then at a substantial stop, the explanation is inadequate; if she was not at a substantial stop, the supposed accident affords no justification of her fault.

(d) The course of the pilot-boat is put by the Alaska's witnesses all the way from N. N. E. to E. N. E. The master judged that if she had carried colored lights she would have shown him her red light before her sudden closing in across his bow. As the Alaska was then heading W. $\frac{1}{2}$ S., and the pilot-boat was only two points on her port bow, in order to show her red light her course must have been nearly E. N. E. But since at 11:40, 28 minutes before, she bore nearly S. W., it is clear that, upon a course of E. N. E., from 11:40 she would not have approached the Alaska at all. The tracing of their positions according to the bearings sworn to, and allowing the highest possible speed of the Columbia, proves that the general course of the pilot-boat after 11:40 could not possibly have been more to the eastward than N. N. E. Her heading was probably about N. by E., and her course about N. by E. $\frac{1}{2}$ E.; or, if her angle of leeway was a full point, she probably headed N. $\frac{1}{2}$ E., with the wind—the direction of which is not certain to a point—N. W. $\frac{1}{2}$ W. The fact that she approached gradually, keeping about the same distance off the Alaska's port bow, shows that her course was probably not much changed until she luffed. Had she changed at any time three or four points to the eastward,—say at 12:06,—so as to show her red light, she would have broadened off the Alaska's bow to much more than two points, instead of closing in as she did. The more rapid sheer of the Alaska to the northward during the few minutes preceding 12:08 shows that the pilot-boat was hauling towards her more rapidly than before, and not bearing off to the eastward. Her hauling in resulted naturally from her nearer approach, though continuing the same course as before. The evidence shows that from 12:02 to 12:06 the Alaska sheered half a point to the northward;

from 12:06 to the collision, a point; and prior to 12:02, only half a point,—from her previous course of W. by S. $\frac{1}{2}$ S., as fixed some 15 minutes before. The evidence of the first officer and helmsman, who relieved the watch at 12:02, show, I think, that the master is mistaken in supposing that the Alaska had ported to W. $\frac{1}{2}$ S. before that time. The fact, moreover, that she sheered a point to starboard after 12:06, though her helm was not nearly hard over, and although the wind operated strongly against a starboard sheer, is further evidence of considerable headway.

(e) The general course that the pilot-boat must have taken from 11:40 to the collision can be determined very nearly from the known course of the steamer, and the distance traveled by her, and from the bearing and speed of the pilot-boat. The average course of the steamer, during the whole interval, was about W. by S. The distance run by her, even upon the figures given by her own witnesses, could not be less than four and one-half miles, as she ran at least two and three-fourths miles during the first 12 minutes. The speed of the pilot-boat was stated to be from seven to eight knots. During the whole interval of 30 minutes the pilot-boat would therefore run from three and three-fourths to four miles. If the pilot-boat bore S. W. or S. W. $\frac{1}{2}$ W. at 11:40, her utmost speed of eight knots would not have been sufficient to enable her to reach the Alaska, had her general course been more than one and one-half points E. of N.

(f) The master estimated the pilot-boat to be two miles distant when he slowed at 11:57, 11 or 12 minutes before the collision, and "nearly a mile" distant at 12:06, when he stopped the engines. But at 12:06 the distance must have been much less,—probably less than half a mile. As the pilot-boat during this interval of nine minutes must have been going within two or three points of a right angle to the course of the Alaska, the latter must have diminished the distance that separated them during those nine minutes by nearly a mile, or at an average speed of over six knots. So, if four minutes before the collision they were nearly a mile apart, even if they had been approaching all the time head on, if the pilot-boat could not make but the rate of eight knots during that time, the Alaska must have made nearly seven. But during the last two minutes, according to the Alaska's own account, the pilot-boat had luffed up so as to draw rapidly across the Alaska's bow. If, therefore, at 12:06, the vessels had been only one-half mile apart, instead of nearly a mile, they could not have reached each other, upon the course the pilot-boat sailed, had not the Alaska made an average speed of at least four knots in that interval.

(g) Again, if the Alaska's speed when her engine stopped at 12:06 was only three and one-half knots, and her headway was stopped at the collision five minutes afterwards, as the Alaska's witnesses contend, she would have gone during this interval about 1,050 feet only, and the movements of the pilot-boat during these five minutes could

not be rationally accounted for. At 12:08 the pilot-boat bore a little less than two points off the Alaska's port bow; and had she been coming up on her general course, N. by E. $\frac{1}{2}$ E., and the Alaska in the mean time moved as slowly as claimed, the pilot-boat would have borne, at 12:06, two minutes before, nearly four points off the Alaska's port bow, instead of two, as the log states. Had the pilot-boat, however, during these two minutes, come upon a course of N. E. by E. so as to preserve her bearing of two points off the Alaska's port bow, then, having the wind aft, her speed would have been increased, and on luffing suddenly just before 12:08, within 500 or 600 feet of the Alaska, she would have come round so rapidly as to cross the line of the Alaska's path, not 250 feet distant, in less than half a minute, instead of three minutes. Luffing suddenly from such a course, her speed would not be much checked, and she would continue at rapid speed till she headed north; nor could she have been kept for three minutes from crossing the Alaska's path without being brought to a stop for a considerable interval. Not only does the testimony, as I have said, show that there was no such stop, but such a mode of navigation for a pilot-boat designing to launch her yawl ahead of the steamer would be in the highest degree improbable. She would naturally check her course gradually as she approached the steamer's head by a gradual, not a sudden, luff.

All the difficulties above referred to proceed really from two assumptions on the Alaska's part: *First*, too little speed; *second*, too much time after the engines were reversed. Correct these, and all the difficulties vanish.

2. As regards the time, I have already observed that the entry in the log, "about two minutes," was evidently an estimate only. The evidence shows that when the engines were reversed collision was apprehended. Experience proves that persons expecting disaster, and not busily employed, overestimate the time. It is natural, therefore, that this interval, then estimated at "about two minutes," should have been much overestimated. It is probable that the time was not over one minute. The fact that the pilot-boat did not stop, and was less than two points off the port bow at 12:08, and yet did not clear the steamer, makes it difficult to believe the interval was over a minute. If it was not, the order to reverse would have had little effect. Other circumstances confirm this view.

At 12:08, when the officers first perceived that the pilot-boat meant to cross the Alaska's bow, the commander exclaimed: "My God! what is that man trying to do?" The first officer exclaimed: "By Jove! that man will be into us; I never saw such a thing in my life!" These exclamations show apprehension of immediate collision; but as the pilot-boat was then less than two points off the Alaska's port bow, and seemed to those officers to be from 250 to 500 feet distant, and had to run only half the distance to reach the point of intersection that the Alaska had to run, it is difficult to see why they

should have had such apprehension of collision if the Alaska at that moment was not running over two knots, as they estimate. The officers were not then aware that the pilots were intending to launch the yawl ahead. I think it was the Alaska's own speed that made the danger, and the apprehension, of collision; and hence the immediate order, "Full speed astern."

Again, the log shows that the Alaska continued backing at full speed from two to three minutes after the collision. Had her headway been stopped, or nearly so, at the moment of collision, there would have been no need of backing so long; for that would have carried her far astern of the capsized yawl sought to be reached. But it was precisely what she would have done had her speed at the moment of collision been some four knots.

Again, when the lines thrown to the men failed to reach them, a seaman ran almost the whole length of the ship, nearly to the stern, where the buoys were kept, and lighted one, and threw it over. This must have occupied at least a minute from the time of the collision. The master estimates from one to two minutes. The yawl and the men had already gone astern, and the evidence shows that the buoy also went first astern, proving that the steamer had headway even a minute after collision, and after two minutes backing. The buoy was soon afterwards overtaken and passed, through the continued backing of the ship, so that it was then seen abeam or forward of abeam.

3. The drifting of the wreck on each side of the Alaska at the rate of from four to six knots is in my judgment far too great to be ascribed to the winds and waves in an ordinary gale. The hull began to sink immediately after the collision, and no rapid drifting was possible after the hull was under water. The capsized yawl, and the spar with the men clinging to them, could not drift at such a rate, even if exposed to the wind; but they were out of the wind in the lee of the ship. The evidence also shows that the different parts of the wreck passed along on both sides of the ship at about the same rate, and appeared opposite the bridge at about the same moment. Only one cause can account for this, viz., the forward motion of the Alaska.

4. Nor can I accept the Alaska's suggestion that instead of encountering her stem the pilot-boat was capsized and smashed in by drifting or being tossed sideways against the Alaska's bow just aft of the stem. The log says the collision was with the stem. One of the officers says the pilot-boat at the collision was right ahead; though another says her light, which was probably on her mainmast, was a little to starboard. When seen a few seconds afterwards only one mast was visible; the other had already disappeared. That must have sunk almost instantly. This does not seem to me likely to have arisen from the pilot-boat's being merely thrown on her beam ends on being tossed by a wave against the Alaska's bow; but from being

cut through by the Alaska's stem when the latter was under considerable headway.

5. The testimony as to the quick-water is of slight weight, because the time when it was observed is easily liable to be mistaken. A seaman testified that he saw the men drawn down by the quick-water amidships; but Mr. Challoner, some 200 or 300 feet further aft, saw the men still drifting astern rapidly. So the purser may have been mistaken as to the time of seeing the quick-water, or have mistaken for that the commotion of the sinking vessel.

6. The estimates by which the Alaska's speed is arrived at by her witnesses are not convincing, when opposed by so many circumstances and so many contrary indications. It is significant, moreover, that not one of the Alaska's officers testified to her ordinary speed when her engines are working at "half speed" or "slow." In the absence of all testimony on the subject, it is scarcely credible that the commander and all the officers are alike ignorant on this point. To omit direct evidence, and to resort to the computations of a mechanical engineer who never saw the ship, based on the engineer's estimates of the number of revolutions per minute, that were not entered in the log, is a substitution of a very inferior kind of evidence, when much better was presumably in the claimants' power.

In other cases the rates of steamers at "half speed" and "slow," as compared with their "full speed," has been often proven before me by the direct evidence of the officers who knew the facts. In no case that I recall have these rates been so much reduced comparatively as the estimates in the present case would make them. Usually what is called "half speed" is fully two-thirds of "full speed;" and "slow," about half of "full speed," and that is so in other steamers of the size of the Alaska; and in fair weather, or in a moderate gale, the proportions remain about the same. These usual proportions, applied to the Alaska, would agree with all the other indications in giving her a speed of from six to seven knots at 12:06, and about four knots at 12:09.

Had the officers of the Alaska supposed that the Columbia intended to cross her bows, and go to windward, instead of porting her helm and going to leeward, as she approached the Alaska, no doubt the order to reverse the engines would have been given earlier, and her speed would have been brought down to the proper minimum. The master testified that the night was "a good one for seeing lights, but bad for estimating distances." Mistake as to the pilot-boat's distance through this cause probably contributed also to the delay in reversing the engines. The master's estimate at 12:06 that the pilot-boat was nearly a mile distant was from two to three times too great. The mistake was a natural one, as the pilot-boat was a small object. It was partly from this cause, I think, and partly because the intention of the pilot-boat to keep her course and cross the Alaska's bow was wholly unexpected, that the Alaska's speed was not brought to a

substantial stop. Notwithstanding the emphatic testimony of the officers of the Alaska and others, the crossing of the steamer's bows in this manner has been practiced by pilot-boats so long, and the duty of coming to a substantial stop for the purpose of taking on pilots is so well settled, that the Alaska cannot be held legally justified in assuming, up to nearly the last moment, that the pilot-boat would change her course, which was obviously across the Alaska's bow, and on that ground be exempted from the duty of coming substantially to a stop. It was the duty of the Alaska to reduce her speed nearly to a stop, so as not to imperil the pilot-boat in any method of approach the pilots might think advisable.

It is not unlikely, on the other hand, that the pilots, at about 12:06, when about one-third of a mile distant from the Alaska, being then about 1,000 feet from the line of her path, in consequence of the great size of that vessel, made the opposite and equally natural mistake of supposing her to be only half the distance off she really was. Thus erroneously believing she was within some 500 feet of the steamer's track, instead of about 1,000 feet from it, the pilot boat would luff when too far away, in order to reduce her speed as usual, so as to launch her yawl. Having twice as far to go as estimated, and being therefore unexpectedly delayed in getting almost ahead of the steamer before she could launch the yawl, aided as this mistake would be through the steamer's constant veering to the northward, the pilot-boat's speed at length would become insensibly so much reduced that, when she did get nearly ahead of the steamer, the latter, coming on under moderate headway, instead of being nearly stopped, the pilot-boat probably had not speed enough remaining to admit of the usual and necessary dexterity in handling, so as to fill away quick enough to escape. The evidence shows that she did bear away, but not in time to clear the steamer. These views of the probable courses and speed of the two vessels fulfill all the conditions of the best *data* in the evidence; viz., the recorded bearings and times, and violate no natural probabilities. No other view that has been presented to me does this, and on careful study I have not been able to discover any other that does so.

Second. I must hold it a further fault in the Alaska that, having first starboarded so as to approach the pilot-boat in the proper direction, she afterwards ported, and under a port helm kept veering to the northward up to the moment of collision; thus delaying and thwarting the expectations and the maneuvers of the pilot-boat to launch the yawl, and then get away. Precisely similar was the course of the steamer that was condemned by the supreme court in the case of *The City of Washington*. But for this latter fault the pilot-boat, notwithstanding the Alaska's too great speed, would have gone clear. The fact that the pilot-boat's general course was crossing that of the Alaska was certainly known. It was the Alaska's duty to come as near to a stop as practicable, and leave the rest to the pilot-boat.

Third. The evidence of the expert pilots in the present case shows fault on the part of the Columbia. They testify that so long as the leeward light only of the steamer is seen, or if she seems to be keeping away, or if the steamer is perceived to be under any considerable headway, no attempt should be made at night to launch the yawl ahead, and cross to windward; that such a maneuver could not be justified; and that when the failure to make the windward light shows that the steamer is keeping off, the pilot-boat should also keep off safe to leeward, and not attempt to launch the yawl ahead. This is certainly reasonable, and I cannot doubt its truth. This evidence materially modifies the custom relied on in the case of *The City of Washington*. Since the date of that case the usage may have been changed somewhat with reference to vessels of the class of the Alaska. The Alaska, upwards of 7,000 tons burden, is at least twice the size of that steamer. With the powerful electric lights now employed by such steamers, and with the general lighting up of the whole ship, when the Alaska approached within a quarter of a mile, I cannot resist the conclusion that the fact that the Alaska was under considerable headway ought to have been apparent to the pilot-boat. In my judgment the steamer must have been going at that time at the rate of five or six knots. A careful watch would have shown that she was not at rest, nor nearly so. In a gale, moreover, such as then prevailed, I should hesitate to find upon the evidence here that a vessel like the Alaska was required to come to a perfect stand-still in the water. The evidence shows that is not now expected. She would very quickly become unmanageable, and fall off into the trough of the sea,—a situation that no pilot would expect her to assume. Neither the supreme court nor the circuit court, in the case of *The City of Washington*, declare it to be the duty of a steamer to come to an absolute stop, unless necessary; and the testimony here shows that an absolute stop was not necessary. In the case of *McLaren v. Compagnie Française*, 9 App. Cas. 640, referred to by counsel, the statement of the head-note is not sustained by the opinion; and that case, moreover, was one of ordinary navigation, not one in relation to the exceptional conditions arising between a steamer and a pilot-boat. I can have no doubt that the pilot-boat was designing to launch her yawl when ahead of the steamer; because there was plenty of time and space for her to cross to windward, and round the Alaska's stern, and there launch the yawl, had that been her intention. Not doing that, nor sailing to the steamer's lee, she must have designed the only remaining course of launching the yawl ahead. Such a course was dangerous and unjustifiable in the gale of that night, even if it be ever justifiable in the night-time. It was still further unjustifiable, and a fault, to persist in this design when she failed to make the Alaska's green light, owing probably to the Alaska's greater distance than supposed, and to her veering to the northward, until her own speed was so re-

duced that she could not be handled with the dexterity that is usual and necessary in order to avoid the steamer in such a maneuver.

Fourth. Under the circumstances of this case, and the difficulties of obtaining evidence of the facts, I must hold that the libelants did not delay beyond a reasonable time before filing the libel on the thirteenth of November, 1884; and that there was no such laches as should discharge the steamer from the maritime lien acquired less than a year previous, in consequence of the transfer in the mean time of the title of the *Alaska*, by Mr. Guion to Mr. Pearce, in October, 1884. It appears that Mr. Pearce, her builder, had claims upon the ship, secured by mortgage, for a great proportion of her value. In the final settlement upon the repurchase, as I understand, he advanced to Mr. Guion about £7,000 cash, besides canceling his other claims. Although the libel had not been filed at the time of this settlement, the accident was notorious; and the possible liability of the *Alaska* was a circumstance that could scarcely have escaped any reasonably diligent inquiry, had Mr. Pearce desired to ascertain all possible outstanding liens, and made reasonable inquiries in that regard. See cases reviewed in *The Bristol*, 11 Fed. Rep. 156; affirmed, 20 Fed. Rep. 800.

Fifth. As respects the right to recover damages in admiralty for the loss of life by the wrongful conduct of vessels on the high seas, some differences are found in the adjudications. It has been repeatedly discussed in its various aspects, and it is understood that the question is now pending in the supreme court. Awaiting the result of the determination of that court, and without referring to the common-law authorities, I shall hold in this case, as seems to me most consonant with natural equity and justice, that the pecuniary loss sustained by persons who have a legal right to support from the deceased furnishes a ground of reclamation against the wrong-doer which should be recognized and compensated in the admiralty. *Cutting v. Scabury*, 1 Spr. 522; *Plummer v. Webb*, 1 Ware, 75; *The Sea Gull*, Chase, 145; *The Garland*, 5 Fed. Rep. 924; *The Harrisburg*, 15 Fed. Rep. 610; *The E. B. Ward, Jr.*, 17 Fed. Rep. 456; S. C. 23 Fed. Rep. 900; *The Manhasset*, 19 Fed. Rep. 430; *The City of Brussels*, 6 Ben. 370.

A decree may be entered for the several libelants to recover half their damages, with costs, and a reference taken to compute the amount.

BEALS v. ILLINOIS, M. & T. R. Co. and others.¹*(Circuit Court, E. D. Missouri. April 15, 1886.)*

CORPORATIONS—BONDS—DEED OF TRUST—DECREE DECLARING VOID—FRAUD.

A decree declaring a deed of trust and bonds secured thereby invalid, entered in a suit to which the trustee named in such deed of trust is joined as a party defendant in his individual capacity, cannot be attacked on the ground of fraud and collusion, after the property has been transferred for value to a purchaser without notice, by a bondholder who was not made a party, in a suit to have such property applied to the payment of his bonds.

In Equity. Motion by defendant for decree on bill, plea, and replication.

This is a suit brought against the Illinois, Missouri & Texas Railway Company, the Cape Girardeau & State Line Railroad Company, the Cape Girardeau Southwestern Railroad Company, and others, by the complainant, as owner of 68 outstanding coupon bonds, issued by the Illinois, Missouri & Texas Railway Company, and secured by a deed of trust upon all the property and franchises of the Cape Girardeau & State Line Railroad Company. The complainant alleges that he purchased said bonds in good faith, for value, and without notice, before they were due, and that interest thereon is past due, and unpaid; and he asks that the property covered by said deed of trust be applied to the payment of his bonds, and for other relief. It appears, however, from the bill and other pleadings, that the bonds in suit here, together with all others of the same issue, and the deed of trust securing them, have been held by the circuit court of Cape Girardeau county, Missouri, to be void, as against the Cape Girardeau & State Line Railroad Company, in a suit brought by said company for the purpose of having them declared void, and in which the Illinois, Missouri & Texas Railway Company, Frederick Winston, the survivor of the trustees named in said deed of trust, and all known bondholders, were joined as defendants; and that the Cape Girardeau Southwestern Railway Company purchased all the property described in said deed of trust from the Cape Girardeau & State Line Railroad Company, for value, after said decree was entered in said suit, and without notice of any fraud or collusion in obtaining it. The present complainant claims that said decree was in fact procured by collusion and fraud; and that he was not a party to the suit in which it was obtained, and was not represented therein by said Winston, because, though the latter was joined as a party defendant, it was in his individual capacity, and not as trustee, and was not served with process, and did not plead as trustee, but only as an individual, and failed to make any defense to the suit in his capacity as trustee, though he knew that said bonds were lawfully issued, and

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

that the deed of trust was valid, and that a good defense could be made.

H. H. Dennison and A. G. Vanderpoel, for complainant.

Geo. D. Reynolds, for the Cape Girardeau S. W. Ry. Co. and the Cape Girardeau & S. L. R. Co.

Thos. C. Fletcher, pro se; the Illinois, Missouri & Texas Railway Company, and George C. Thilennies.

TREAT, J., (*orally*.) I do not propose this morning to go through a detailed consideration of the record in this case. It suffices that the second railroad corporation, which was the successor of the first railroad corporation, issued bonds. The subject-matter of the validity of those bonds was fully heard in a court of competent jurisdiction, and the bonds were pronounced void. Now, here is an attempt to charge the successor of the second corporation with those bonds, which have already been pronounced invalid, without any allegations that would enable the court to fasten on the third corporation void obligations. I cannot understand the theory of the bill to be within any rule of law or equity, and it suffices that the state of the record shows that there is nothing to charge these parties defendants with any of those obligations.

The decree of the court will be that the bill be dismissed, with costs.

BOGART v. ELECTRICAL SUPPLY CO.

(*Circuit Court, S. D. New York. 1886.*)

ATTORNEY AND COUNSELOR—SUBSTITUTION—REFERENCE—COSTS—ATTACHMENT.

In an application by a party for leave to substitute a new attorney, which has resulted in a reference to a master, and a decision that the attorney was not entitled to further compensation than he had already received, the court has power to enforce obedience to the order requiring the attorney to pay the costs of the reference by attachment.

Application for Leave to Substitute New Attorney.

Walter D. Edmonds, for plaintiff.

A. H. H. Dawson, for defendant.

WALLACE, J. Upon further consideration, the doubt suggested upon the argument of this motion, as to the power of the court to enforce obedience to the order requiring the attorney to pay the costs of the reference to the master by attachment, has been wholly removed. The attorney was required by the order to pay the costs to which his client had been unjustly subjected upon his application for leave to substitute a new attorney, which resulted in a reference to a master, and a decision that the attorney was not entitled to further compen-

sation than he had already received. He has not paid the costs. Treating the present application as though it were made by the client, the plaintiff in the suit, instead of the master, in whose behalf it is really made, it is one for the exercise of the summary jurisdiction possessed by courts over attorneys as their officers by attachment, when the professional conduct of the attorney in a cause pending before the court is involved. The statute (section 725, Rev. St.) has not restricted the power of the court to punish for contempt any officer of the court in his official transactions, or his disobedience of any lawful order. It was entirely proper to order the attorney to pay the costs which he had unnecessarily imposed upon his client, and a decent regard for the dignity of the court requires that obedience to the order be compelled. If the respondent had alleged his inability to comply with the terms of the order, such an excuse would be considered; but, in the absence of such an excuse, the case is one where the remedy by attachment should be allowed. The statutes prohibiting imprisonment for debt have no application to such a case. The courts have always allowed the summary remedy of an attachment to compel an attorney to observe the duties incident to his professional relations towards his clients, and towards the other officers of the court, and in this state it is even held that it is not essential to the exercise of this summary remedy that the transaction should arise out of a suit in the court, or in reference to any legal proceedings. *In re Dakin*, 4 Hill, 42. *Bowling Green Sav. Bank v. Todd*, 52 N. Y. 489; *In re H.*, 87 N. Y. 521. The affidavits on the part of the respondent indicate that he has not been guilty of any intentional disobedience of the order, but rather that he has acted upon a misconception of his rights and duties. An attachment will be issued, unless within 15 days he pays the sum heretofore ordered to be paid, as taxed by the court.

BERRY and others v. DE WITT and others.

(Circuit Court, S. D. New York. June 16, 1886.)

1. NEW TRIAL—JURY—PREJUDICE—EXPRESSIONS OF OPINION.

That some of the jury indicated, by their language and manner in the jury-box, during the progress of the trial, that their minds were opposed to the defendant's case, is not a ground for a new trial, when there is no adequate reason to suppose that any juryman was not impartial when the trial commenced, and when no means were taken by the plaintiff to cause a too hasty or prejudiced decision.

2. SAME—MISCONDUCT—WAIVER.

Misconduct of a juror, in conversing with one of the plaintiffs during the trial, is waived, if known to the defendant at the time of its occurrence, and not made the subject of a motion to the court.

Motion for New Trial.

Henry E. Tremain, for the motion.

John E. Parsons, against the motion.

SHIPMAN, J. This is a motion by the defendants for a new trial. The questions of law arising upon the bill of exceptions were not argued by the defendants' counsel at any length. I shall not, therefore, enter into a written examination of these questions, but leave them for the consideration of the appellate court.

The defendants' counsel relied, before me, for a new trial, upon the alleged prejudice and the manifested antagonism of some of the jurors against the defendants' case. That some of the jury did indicate, by their language and manner in the jury-box during the progress of the trial, that their minds were opposed to the defendants' case, is true; but I do not think that this is a ground for a new trial, when there is no adequate reason to suppose that any jurymen was not impartial when the trial commenced, and when no improper means were taken by the plaintiff to cause a too hasty or a prejudiced decision.

The alleged misconduct of a juror in conversing with one of the plaintiffs during the trial, and expressing an opinion upon the case, is strongly denied by the person with whom he is said to have conversed. If the allegation was true, the conversation was overheard and was understood by one of the defendants' counsel, and was not brought to the notice of the court. Such misconduct of a juror during the trial, if known to the party at the time of its occurrence, and not made the subject of a motion to the court, is waived. A party cannot know, during the trial, a fatal objection arising from the misconduct of a juror upon the trial, and keep silence, and take advantage of it in the event of an adverse verdict. He is not permitted to "speculate upon the chances of a verdict." *State v. Tuller*, 34 Conn. 280.

The motion for a new trial is denied.

ANTHONY *v.* LOUISVILLE & N. R. Co.¹

(Circuit Court, E. D. Missouri. March 29, 1886.)

1. CARRIERS—OF PASSENGERS—RAILROADS—NEGLIGENCE.

It is the duty of railroad companies to use the best mechanical appliances, and to exercise the highest degree of prudence and skill, to determine that all their appliances are safe for purposes of transportation, and in case an accident results from a failure to use such appliances, or to exercise the proper degree of care and skill, they are liable in damages.²

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

² See note at end of case.

2. SAME—RAILROAD NOT AN INSURER.

A railroad company is not an insurer, however, and where an accident happens in consequence of a latent defect in a rail or other appliance, which could not have been discovered by any degree of intelligence, prudence, or skill, it is not liable.

3. DAMAGES—PERSONAL INJURY.

Where a passenger meets with an injury in consequence of the negligence of a railroad company, he is entitled to compensation therefor, including all expenditures made in consequence of the injury, together with loss of time, and proper allowance for any special mental or physical suffering; and in assessing damages, the jury should consider whether the injury is permanent or temporary.

At Law. Suit for damages. The plaintiff states in his petition that, while being transported by the defendant over its road, the car in which he was riding was thrown from the track, through the defendant's negligence, and that he received a serious bodily injury, for which he asks damages. Answer denying negligence, and alleging that the car on which the plaintiff was riding when hurt was thrown from the track by a rail broken by the preceding cars of the train, and that the rail broke because of a concealed defect, which could not have been discovered by inspection. The evidence was conflicting.

Nathan Frank, for plaintiff.

Henry W. Bond, for defendant.

TREAT, J., (charging jury orally.) The principles of law governing cases of this character are very few and very simple. A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such as the highest degree of human skill and prudence could furnish. If he meets with an injury through the fault of the railroad company, he is entitled to compensation therefor, including all the expenditures by him made in consequence of said injury, together with his loss of time, and a proper allowance for any special suffering to which he may have been put, mentally or physically; and also the jury will take into consideration whether the injury is permanent or temporary. Now, in this case, it seems—and it is for you to determine, gentlemen, in the light of the testimony—that the injury was caused by a defective rail, while this train on which the plaintiff was a passenger was running at such rates of speed as has been presented to you, when this rail was hit. It is the duty of a railroad company to exercise the highest degree of prudence and skill to determine that everything is safe for transportation. If an accident happens in consequence of a failure to exercise that degree of skill and prudence, the company is responsible for what may happen. On the other hand, a railroad company, like an individual, can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect,—a concealed defect,—which that degree of intelligence, prudence, or skill cannot detect, it is not responsible for what may happen. In other words, a railroad company

is not an insurer, and while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters. If this is done, and an accident occurs, it has discharged its duty. It is unfortunate that some one should suffer, but the measure of duty having been discharged as thus stated, by the railroad company, the loss must fall where it unfortunately has fallen.

Consequently, this case has seemed to the court all the way through to turn on one question, mainly, viz., the character of the rail. Was it a rail not fit to be used, and could the company have known it, for the purposes for which it was used. If it could, the company was liable for the injury that was caused by the use of such an improper rail. *Second*, if it were originally fit for the purposes used, and through some cause or other it had become defective, and the company could have detected that defect, and the injury was caused, still the company is liable. I put a great many questions, because it did not seem clear to my mind,—though I am not to determine that, and the jury are to determine it,—as to what was the character of the rail itself, and what were its connections with the adjoining rails.

Ordinarily, as stated by the witnesses here, under our modern contrivances for safety, rails on a track are not only fastened by what are known as "chairs" and "ties," but also by fish-plates. I endeavored to ascertain, if possible, the condition of these fish-plates, so that after the accident it might be determined whether there were fish-plates at either end of this short rail. It is for you to say with regard to that. It does not become the court to comment on the testimony. It must suffice for the purposes of this case, so far as the court is concerned, that this accident happened. You have heard the testimony as to how it happened. You have heard the effect upon this rail, broken into sections of several pieces; and if that rail was fit for the work, and the exercise of the highest degree of care and attention on the part of this railroad would not have enabled it to detect that it was unfit, as it turned out to be, then the company is not liable. If it was unfit, and they knew it, or by extreme care and skill could have found that it was unfit when the injury occurred, then the company is liable. So, practically, the question is, was this a latent defect, which could not be detected by the company? If it was, the company is not liable; if it were otherwise, then the company is liable.

Take the case gentlemen.

Verdict for the defendant.

NOTE.

It is the duty of a carrier of passengers to exercise extraordinary care and caution. *Raymond v. Burlington, C. R. & N. Ry. Co., (Iowa,)* 21 N. W. Rep. 495.
One whose presence on a railway train is not wrongful, may recover for injuries

caused by the negligence of the carrier, although he was not a "passenger," in the ordinary sense of the term. *Gradin v. St. Paul & D. Ry. Co.*, (Minn.) 14 N. W. Rep. 881.

A person who travels on a railroad train on the ticket of another, contrary to the rule of the company printed on the ticket, and without the consent of the company's agent, perpetrates a fraud, and in case of his receiving injuries during the trip the law of common carriers cannot be invoked to make the company responsible. *Way v. Chicago, R. I. & P. R. Co.*, (Iowa,) 19 N. W. Rep. 828.

The right which a passenger by railway has to be carried safely does not depend on his having made a contract for carriage; the fact of his being there creates a duty on the part of the company to carry him safely. *Austin v. Great Western Ry. Co.*, 15 Wkly. Rep. 863; *Waterbury v. New York Cent. & H. R. R. Co.*, 17 Fed. Rep. 671; *Story, Bailm.* § 592 *et seq.*; *Thomp. Carr.* 20 *et seq.*

The railroad company is bound to make reasonable provisions for the safety of all passengers; and for a failure of this duty the passenger may maintain an action against it as for pure tort. *Berringer v. Great Eastern Ry. Co.*, 4 C. P. Div. 163; *Foulkes v. Metropolitan Dist. Ry. Co.*, Id. 267; *Johnson v. West Chester, etc., R. Co.*, 70 Pa. St. 357.

It is said that it has always been the law that a carrier who inflicted an injury on a passenger may be sued in tort. *Ansell v. Waterhouse*, 2 Chit. 1; *S. C. 6 Maule & S.* 385; *Bretherton v. Wood*, 6 J. B. Moore, 141; *S. C. 3 Brod. & B.* 54; *Bank of Orange Co. v. Brown*, 9 Wend. 85; *McCall v. Forsyth*, 4 Watts & S. 179; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537; *Heirn v. McCaughan*, 32 Miss. 17; *Cregin v. Brooklyn, etc., R. Co.*, 75 N. Y. 192; *Saltonstall v. Stockton, Taney*, 11; *Frink v. Potter*, 17 Ill. 406; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Ames v. Union Ry. Co.*, 117 Mass. 541.

It is said that any negligence on the part of a carrier using so dangerous an agency as steam is culpable or actionable, (*The New World v. King*, 16 How. 469.) even though the person be carried gratuitously; for the principle applicable to such cases, it has been well said, is: "If a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, the omission of that skill is imputed to him as gross negligence." *Shiells v. Blackburne*, 1 H. Bl. 158; *Wilson v. Brett*, 11 Mees. & W. 113; *Nolton v. Western R. Corp.*, 15 N. Y. 444; *Siegrist v. Arnot*, 10 Mo. App. 198.

ANGLO-CALIFORNIAN BANK v. AMES.

(Circuit Court, D. Nebraska. June 7, 1886.)

1. INSANE PERSONS—ACT OF LUNATIC—ESTOPPEL.

One who is disabled by want of mental capacity to act, cannot be estopped to deny that he has acted. An estoppel creates no power, and while, in favor of a *bona fide* purchaser of negotiable paper, inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties.

2. SAME—CERTIFICATE OF DEPOSIT—INDORSEMENT BY LUNATIC—INNOCENT PURCHASER.

The indorsement of a certificate of deposit by the insane person, in whose favor it was drawn, carries no title, even to an innocent purchaser.

At Law.

J. W. Savage and Dwight Hull, for plaintiff.

J. L. Webster, for defendant.

BREWER, J. This was an action on a certificate of deposit. It was tried by a jury, and a special verdict returned. The plaintiff claims as a *bona fide* purchaser of the paper. The bank, maker of the certificate, brought the money into court, and left the issues to be tried between the plaintiff and the defendant, Ames, the payee and indorser of the certificate. The jury found that Ames at the time of the indorsement was of unsound mind, and did not know what he was doing;

that the indorsement was obtained by fraud and deception; and that Ames received no consideration therefor. Of these facts the bank was ignorant when it purchased.

The question, therefore, is between a lunatic and an innocent purchaser of his paper. How far the contract of a lunatic, not as yet under guardianship, can be enforced, may not be clearly settled. When full consideration has been given, and the contract made in good faith, the mental infirmity has often been disregarded, and the contract enforced. Yet, obviously, on principle, any promise of such a person lacks the essential element of a contract, to-wit, assent. As said by the supreme court in *Dexter v. Hall*, 15 Wall. 20:

"Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding or acting in the ordinary affairs of life can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds, but a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, on principle, that he cannot make a contract which may have any efficacy as such."

One great difficulty in this class of cases lies in our lack of ability to distinguish difference of mental condition and the paucity of language to accurately describe such differences. Between him whose mental faculties seem all unbalanced,—in whose chambers of thought chaos reigns supreme, "confusion worse confounded,"—and him but a single wheel of whose mental mechanism is out of gear, there is a world-wide difference, and yet both are classed as persons of unsound mind. We determine one's mental condition only from his words and acts; yet often how difficult it is to look through the outer life to the inner soul? The craziest reason correctly—speak and act sensibly—upon some subjects; while there are others so many of whose mental processes are rational, and so few unbalanced and in confusion, that we hesitate to declare them incapable of self-control, and irresponsible for their actions and contracts. Is it strange, in respect to such a person, that when every thing seems to have been fairly done, and a full consideration passed, the courts have spoken lightly of the mental infirmities, and upheld the contract? On the other hand, when gross injustice has been done,—especially when the mental incapacity is obvious and pronounced,—the inclination has been to denounce the wrong, and protect the unfortunate imbecile from the rapacity of the willful spoiler. Such is this case. The defendant was of unsound mind. He received nothing. He knew not what he was doing. His contract was obtained by fraud and deception. There is not a single feature which would give the slightest excuse for upholding the transaction as between the immediate parties.

Does the plaintiff, as a *bona fide* purchaser, occupy any better position than the wrong-doer from whom it purchased? Doubtless, it is entitled to all the protection given to such a purchaser of negotiable paper; but such protection does not extend to an indorsement like this.

There was no valid contract of indorsement created by defendant's signature on the back of the paper. It was no better than a signature written in a state of somnambulism, or even than a forgery. No negligence is imputable, for one who is incapable of prudence cannot be guilty of negligence; nor can there be an estoppel. He who is legally disabled to act, cannot be estopped from denying that he has acted. An estoppel creates no power; and while, in favor of a *bona fide* purchaser, inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties. Such, at least, is the better doctrine, although it must be conceded that there are authorities to the contrary, especially in the English courts.

The case of *Wirebach v. First Nat. Bank*, 97 Pa. St. 543, is a late case, in which this subject received consideration. In it we find this language:

"The question now presented is, will an action lie on the accommodation indorsement of a promissory note by a lunatic? If the determination of this was not made, it was clearly indicated, in *Moore v. Hershey*, 9 Norris, 196. There the action was by an indorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note; which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane. But the offer was rejected, the court below ruling that as the note in suit was commercial paper, and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. Paxson, J., said:

"We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the *status* of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration. There must be a limit to the civil responsibility of persons of unsound mind; otherwise, their property would be at the mercy of unscrupulous and designing men. If the holder could recover against one who was insane when he indorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or indorses a note may, by his representative, plead his infancy as a complete defense. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to the indorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him, or for want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing; nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves; but it would be sorry protection if one holding a valid note against a helpless man for four thousand dollars, could get it renewed for ten thousand dollars, and recover the full amount of the renewal note."

McClain v. Davis, 77 Ind. 419, was a case where a promissory note was obtained from an insane man to cure him of a disease, as in the

case at bar. The note came into the hands of a bank, for value, without notice. The court say:

"There was nothing received in consideration of the contract under consideration of which it can be said that restitution should be made before a disaffirmance should be permitted; and it is no objection that the note had passed, before maturity, into the hands of an indorsee. Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the party,—such as infancy, coverture, and unsoundness of mind. 1 Pars. Notes & Bills, pp. 149, 150; Edw. Bills, pp. 63-69."

See, also, 1 Daniel, Neg. Inst. § 210, in which the author says:

"No matter how perfect the note may be in form, it would be void in the hands of every person, however innocent, as against the imbecile or lunatic." See, also, *Burke v. Allen*, 29 N. H. 106.

I think judgment should be entered on the special verdict in favor of the defendant.

UNITED STATES v. DOHERTY.

(District Court, S. D. New York. June 8, 1886.)

1. STATUTES, CONSTRUCTION OF—DISCRETIONARY POWER.

Under statutes conferring a general discretionary power without qualification, the exercise of the officer's discretion is limited, by legal construction, to the evident purposes of the act, and to what is known as a sound and legal discretion, excluding all arbitrary, capricious, inquisitorial, and oppressive proceedings.

2. COURTS—JURISDICTION—SPECIAL TRIBUNALS—REVIEW—EXCESS OF POWER.

Though the acts of special tribunals cannot be in general reviewed, except as provided by law, they may be examined collaterally as respects their jurisdiction, and as regards acts in excess of power; and as to such acts their proceedings will be held unauthorized and void.

3. CUSTOMS DUTIES—APPRAISEMENT—EXAMINATION OF WITNESSES—PENALTY—REV. ST. §§ 2922, 2923.

The defendant had contracted at Lyons, France, with manufacturers there to deliver at his store in New York certain goods, free of all charges, at a certain price in dollars, indicated by certain cipher marks. The manufacturers subsequently imported the goods into the United States, and upon appraisement by the appraiser for the purpose of collecting duties the defendant was examined as a witness, and required to state the price in dollars indicated by the cipher marks, which he declined to do, as prejudicial to his interests. Section 2922 of the Revised Statutes authorizes appraisers to examine on oath any person "touching any matter or thing they may deem material in ascertaining the foreign market value;" and section 2923 imposes a penalty for declining to answer any such interrogatory. There was no evidence of any concealment or fraud in the importation, or of the absence of the ordinary means of ascertaining the market value of the goods in the principal markets of France, which was the only ultimate question for the appraiser's determination. *Held*, that the discretion of appraisers in putting inquiries under section 2922 is not unlimited, but restricted, by the purposes of the act,—by the limitation of section 2902,—to "reasonable ways and means," and to the exercise of a sound and fair judgment of what was material to the ascertainment of the market value in the principal markets of the country of exportation; that the inquiry as to the contract price for the future delivery of goods at a store in New York, free of all charges, was *prima facie* incompetent, be-

cause too remote and uncertain as evidence of the foreign value, and resort to such evidence was justifiable only upon the failure of the ordinary and appropriate proofs; that to compel such disclosures, without necessity, from a stranger to the importation, when such disclosure would be prejudicial to his business interests, was not within the reasonable ways and means prescribed by the statute, nor the exercise of a sound and reasonable discretion, and was therefore in excess of the appraiser's lawful power, in the absence of special reasons to justify it; and that no penalty, therefore, was legally incurred.

At Law.

Stephen A. Walker, U. S. Atty., and *John P. Clarke*, Asst. U. S. Atty., for the Government.

Seward, Da Costa & Guthrie, for defendant.

BROWN, J. This suit is brought under section 2923 of the Revised Statutes, to recover of the defendant a penalty of \$100, for declining to answer a question asked him by the custom-house appraiser in reference to the price of certain goods which were before the appraiser for appraisement. Upon the trial before the court and a jury a verdict was directed for the plaintiff, subject to the opinion of the court, there being no dispute about the facts. It was admitted that the defendant, who was one of the firm of J. & C. Johnston, of this city, contracted with the manufacturers at Lyons, France, for the delivery of certain goods at the defendant's store in New York, at a price named, free of all charges. The goods in question, designed to fill the defendant's order; were afterwards forwarded and imported into this port by the manufacturers, were entered at the custom-house by their agents, and sent, in regular course, to the appraiser for the appraisement. Upon an examination by the appraiser of Mr. Vietor, one of the manufacturers' agents here, he produced a letter from the manufacturers in which it was stated that the goods in question had been forwarded to be delivered by the agent to J. H. Johnston "at \$ H. x. x." Upon Mr. Vietor's stating that he was not at liberty to disclose purchasers' prices, the defendant, who had made the contract in France, was summoned and sworn by the appraiser, and required to state the price in dollars indicated by the cipher "\$ H. x. x." The witness objected that the disclosure of the price would be prejudicial to his business interests, and that he was not legally required to answer such a question; and this suit was therefore brought to recover the statutory penalty of \$100 for declining to answer.

By section 2902 it is made the duty of the appraisers, "by all reasonable ways and means in their power," to ascertain, estimate, and appraise "the true and actual market value of the merchandise, at the time of exportation, in the principal markets of the country" from which the article has been imported into the United States. For that purpose they are authorized by section 2922 to "call before them and examine on oath any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining

the market value or wholesale price of any merchandise imported." By section 2923, if any person so called shall "decline to answer any interrogatories when so required" by the appraiser, he is made liable to a penalty of \$100.

Two questions have been argued before the court: *First*, whether the power and discretion vested in the appraisers, under the above statute, to require answers to interrogatories, are unlimited, and not subject to any review or question by the court in an action brought for the penalty; and, *second*, if limited, whether the inquiry in this instance was material.

1. The statute, it will be observed, imposes the penalty "for declining to answer any interrogatory;" not for declining to give the desired information. The witness did not, in this case, decline to make answer to the interrogatory. The two things are not the same. If, in reply to an interrogatory, a witness says that he does not know, and if in fact he does not know, that is of course a sufficient answer, though he does not give the information desired. So the witness, though having the information desired, might be privileged, upon a variety of grounds, from disclosing what he knows. If he states any valid excuse for not giving the information, that is all the answer that the statute requires. This constitutes, therefore, one limitation upon the appraiser's authority. He cannot extort information that the witness is legally privileged from disclosing; and a true answer stating ignorance or a legal privilege is a sufficient answer.

2. The power of the appraiser is further limited by the rule of statutory construction that limits the general words of statutes giving a discretion apparently unlimited, to a legal, reasonable, and just discretion, having reference to the objects of the statute. The very language of this statute, construed with others *in pari materia*, indicates a similar restriction.

The general rule, indeed, applicable to the decisions of courts, or of special officers to whom the determination of any particular matter is committed by law, is that such determinations cannot be attacked collaterally, nor reviewed in any other mode than such as may be provided by law. If there is no mode of review provided, they are final and conclusive. *U. S. v. Leng*, 18 Fed. Rep. 15-20; *U. S. v. McDowell*, 21 Fed. Rep. 563, 564, and cases there cited. See, also, *Martin v. Mott*, 12 Wheat. 19; *Foley v. Harrison*, 15 How. 448; *People v. Collins*, 19 Wend. 56; *People v. Stout*, 11 Abb. Pr. 17. It is upon this principle that the counsel for the plaintiff chiefly rely. To this general rule, however, there are several exceptions as far-reaching as the rule itself. Cases of *habeas corpus* illustrate most frequently both the rule and its exceptions. Though that writ is not suffered to perform the office of a writ of error, the inquiry is nevertheless open whether (1) the committing magistrate or the court had jurisdiction of the person and of the subject-matter; (2) whether the statute is constitutional; (3) whether the proceeding as respects the

particular objected to, was in accordance with or in excess of the statute. In *Ex parte Rowland*, 104 U. S. 604, Chief Justice WAITE, (page 612,) in delivering the opinion of the court, says:

"If the command of the peremptory writ of *mandamus* was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court." *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, Id. 339; *Ex parte Wilson*, 114 U. S. 417, 421; S. C. 5 Sup. Ct. Rep. 935.

So, in extradition cases, a person held for extradition upon no competent evidence will be discharged because held in excess of power. But if the record shows some competent evidence of criminality, the officer's determination in that regard is conclusive on *habeas corpus*; and it cannot be set aside on the ground that some incompetent evidence was also received. *In re Joseph Stupp*, 12 Blatchf. 501, 519; *In re Fowler*, 18 Blatchf. 430, 443; S. C. 4 Fed. Rep. 303; *In re Wadge*, 15 Fed. Rep. 864. So an assessment of duties by a collector on a valuation of his own, or a reappraisement by an appraiser who had never seen the goods, or an appraisement made without examination of the goods, or on an erroneous basis as to time, are each in excess of power, and void. *Morlot v. Lawrence*, 3 Blatchf. 122; *Wills v. Russell*, 1 Holmes, 228; *U. S. v. Frazer*, 10 Ben. 347; *U. S. v. McDowell*, 21 Fed. Rep. 563; *Ystalifera Iron Co. v. Redfield*, 23 Fed. Rep. 650, 651.

The question is therefore one of statutory power or authority, depending upon the construction to be given to the statute. If by the words of section 2922, "touching any matter or thing which they may deem material," the statute intends to confer on the appraiser the power to require answers to all questions that he may choose to ask, whether they be relevant to the subject-matter or wholly irrelevant, then upon refusal to disclose any information in the witness' power, not privileged, the penalty is incurred. But if such is not the intention of the statute, such inquiries are in the eye of the law in excess of the appraiser's power, and no penalty is incurred by refusal to answer.

The subject of discretionary power was among the earliest to which the limitation of the general language of a statute by construction was applied. "*Discretio*," says Lord Coke, (4 Inst. 41,) "*est discernere per legem quid sit justum*." In *Rooke's Case*, 3 Coke, 99, 100, it is said: "And notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law;" and this was approved by Lord MANSFIELD and Mr. Justice WILMOT in *Rex v. Peters*, 1 Burr. 568-570.

So the discretionary power of adjournment must be exercised rea-

sonably, and not arbitrarily or unjustly; otherwise the proceedings will be set aside on *certiorari*, though, ordinarily, such discretion is not subject to review. *Rose v. Stuyvesant*, 8 Johns. 333; *President, etc., v. Patchen*, 8 Wend. 47. In the latter case the chancellor says, (page 64:) "Where palpable injustice has been done in a court of inferior jurisdiction in the exercise of a discretionary power, in opposition to the settled principles of law and equity, their proceedings may be corrected by *certiorari*." So, in one of the latest decisions on this subject, in the case of *In re Holbrook*, 99 N. Y. 539, S. C. 2 N. E. Rep. 887, in reference to the scope of an examination of assignees authorized under a general statutory power, the court say, (page 545:)

"The general words are necessarily qualified and limited by the purposes of the act, and the objects thereinbefore stated, as the end of the examination. So construed it is practicably just and reasonably convenient. If the words control, so that not only at any time, but for any and all purposes which a creditor might suggest, an examination of persons and books could be had, there would be palpable injustice and absurdity."

See, also, *Great Western R. Co. v. Loomis*, 32 N. Y. 127.

In *U. S. v. Kirby*, 7 Wall. 486, the supreme court say, in reference to the construction of statutes:

"General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

These principles and authorities seem to me to be applicable to this case. To extort answers to inquiries that are not relevant to the subject-matter; to compel a disclosure of facts that could not properly be made use of in the appraiser's determination of the foreign value, and which would be prejudicial to the interest of the witness in the competitions of business,—would be not only unreasonable, but unjust, inquisitorial, and oppressive.

A construction of the statute that would authorize such inquiries is not only forbidden by the general rules above cited, but, looking at the language of the act, and at other sections of the Revised Statutes *in pari materia*, it is clear that no such latitude of inquiry is intended. Section 2902 authorizes the appraisers to ascertain the value "by all reasonable ways and means in their power." Section 2922 is in furtherance of that section, and is subject to the general limitation there implied, viz., that only reasonable ways and means be employed. Moreover, the particular language of section 2922, authorizing the appraisers "to examine any person on oath touching any matter or thing which they may deem material in ascertaining the value," necessarily implies that the inquiry be limited, (1) to ascertaining the foreign market value; (2) to what is material to that end; (3) that the appraiser must "deem" the inquiry material. To deem, here, means to judge; to determine upon consideration. The primary meaning of the word (A. S., *deman*) is "to form a judgment," (Stormonth;)

"to conclude upon consideration," (Worcester.) The officer is legally held, therefore, to the exercise of a reasonable judgment, and is limited to reasonable inquiries. These are implied limitations of his power; otherwise the intent of the law would be perverted. Upon the language of the statute, therefore, as well as by the general rules of construction, such inquiries only are within the scope and intent of the statute as upon the exercise of a fair and reasonable judgment are held to be material to the ascertainment of the foreign value. Whatever is beyond that is inquisitorial, oppressive, and in excess of power. And inasmuch as the appraiser himself is not authorized by law to adjudge any penalty, and since the question whether a penalty is incurred or not must be submitted to the court upon an action brought therefor, the court must determine whether, under all the circumstances of the case, the "ways and means" pursued by the appraiser were "reasonable," and whether the question, and the information sought, were "material," or could rightly be made use of within the limits of a reasonable judgment and discretion. Any other construction would not only clothe the appraiser practically with a wholly arbitrary and irresponsible power, but would require the court to enforce penalties upon the mere caprice of the appraiser, however unreasonable and oppressive they might be. If that were the clear intent of the statute, doubtless it must be done. But very explicit evidence of such an intent would be necessary to lead the court to follow that construction. More general, unqualified language is not sufficient. That such was certainly not the intent in this case is further evinced from the fact that the imposition of penalties is not left to the appraiser, but is subject to the decision of the court in an independent action, in which the proceeding before the appraiser, and its conformity with the intent of the statute, are necessarily brought in review.

3. There is nothing in the record in this case, or in the correspondence or papers produced in evidence, that shows that the answer desired, namely, the price in dollars at which the manufacturers contracted to deliver certain similar goods at the defendant's store in New York, was in any way material, or could be lawfully considered by the appraiser in ascertaining the foreign value of this importation. Except in cases of fraud or concealment, or in the absence of the ordinary and appropriate means of information as to the foreign value, evidence of this kind, in suits growing out of the alleged undervaluation of goods, where the question to be tried is precisely similar, has been uniformly held to be incompetent. The evidence in this case shows that the goods in question were still the goods of the foreign manufacturers. They were imported into this country by them; the goods had not been delivered; they were sold to the defendant's firm under an executory contract; and they had not been accepted by the witness, or even examined. In the *Sherry Wine Cases*, 2 Ben. 250, where this point was raised, BLATCHFORD, J., in a careful charge,

instructed the jury that unless the price named in New York was adopted for the purpose of concealing the real foreign price, it must be disregarded, because "it had nothing to do with the case." Similar evidence was excluded in the *Champagne Cases*, 1 Ben. 244.

Upon the trial of the present case the appraiser was called as a witness. He did not even testify that he deemed an answer to this inquiry to be material to the appraisement. There was no allegation of concealment; no proof or suggestion of any inability to ascertain the foreign value in the ordinary ways. It was admitted that there was no element of fraud in the case, and nothing exceptional in the circumstances is intimated. It does not in any way appear how much or how little other evidence the appraiser may have had as to the market value in the principal markets of France. The value there, not here, was the question, and the only question, for his ultimate decision. Where no reasons appear, such as concealment or fraud, or the absence of the ordinary appropriate proofs, that would render the contract price of delivery in New York competent, I cannot regard the inquiry as a reasonable one, or within the limits of the appraiser's authority. There are many elements that enter into an agreement made in a foreign country for the delivery of goods at a future time in New York, at a New York price, that make the New York price no criterion of the market value "in the principal markets" of a foreign country at the time of exportation. By making various allowances and deductions, as for interest, for freight, for differences of time, changes of circumstances, and possible fluctuations in the market prices, some approximation, doubtless, to the presumptive foreign market value at the time of exportation might be arrived at. But that is resorting to very roundabout and uncertain methods, which are neither reasonable nor justifiable except upon the failure of proper means of inquiry. It is for these reasons that such evidence is ordinarily legally incompetent. It is rejected by the courts, not upon any formal or technical grounds, but because of its irrelevancy, remoteness, and uncertainty; and the same objections are as applicable upon an appraisement as upon a judicial trial. In either case there must be proof of special circumstances to make it reasonable and competent; and there was no such proof here. The very fact that there is no review of the appraiser's determinations of value in the courts makes it all the more obligatory that that valuation should not be arrived at by unreasonable or unjustifiable methods, nor based upon remote and incompetent evidence, when appropriate evidence is available. Doubtless the appraiser is not bound by all the legal rules as to the admissibility of evidence in courts. All mere technical rules may be disregarded by him. But the statute, in requiring that the matters inquired of shall be "material," and material in ascertaining the foreign value, and in leaving the question of this materiality to the appraiser, binds him to a considerate judgment upon the propriety of the ques-

tions asked; that is, to a judgment based upon the substantial and fundamental rules of law as respects the reasonableness and competency of the inquiry, excluding all technicalities. These essential rules clearly exclude such an inquiry as that under consideration, except under exceptional circumstances, which are not proved, and of which nothing in the evidence in this case furnishes any indication. To hold the question asked in this case to be within the appraiser's power under such circumstances would be to hold, in effect, that the appraiser might at his arbitrary discretion, and without reason, abandon all the direct and ordinary proofs of foreign value, and substitute therefor remote, uncertain, and legally incompetent proofs, through inquiries prejudicial to the interests of a witness who has no concern in the appraisement. I cannot sustain this view.

The limitation upon the appraiser's discretion above indicated cannot work any practical embarrassment in the performance of his duties, nor afford any protection to witnesses that refuse to answer any reasonable inquiries. The special circumstances that make necessary and justify the resort to inquiries ordinarily incompetent can always be shown upon the trial, whenever such circumstances exist. If such circumstances do not exist, such inquiries are not justifiable, and cannot serve as the foundation of a suit for penalties.

The question asked in this case being presumptively unwarranted by law, and beyond the scope of the appraiser's lawful inquiry, it was for the plaintiff to prove the exceptional circumstances, if any, that made it competent; and that was not done. On this ground, therefore, and following the rule laid down by BLATCHFORD, J., in the *Sherry Wine Cases*, *supra*, judgment will be directed for the defendant.

NETHERCLIFT and others v. ROBERTSON.

(Circuit Court, S. D. New York. June 19, 1886.)

1. CUSTOMS DUTIES—TREATIES—TARIFF LAWS—DOMINICAN REPUBLIC—HAWAIIAN ISLANDS.

The treaty with the king of the Hawaiian Islands, and the act of congress giving it effect, (19 St. at Large, 200,) by which sugar from those islands was admitted into the United States free of duty, did not operate upon the previous treaty with the Dominican republic, so as to establish a like exemption as to sugar imported from the latter country; following *Bartram v. Robertson*, 15 Fed. Rep. 212, and *Whitney v. Robertson*, 21 Fed. Rep. 566.

2. SAME—ACT OF CONGRESS OF 1883.

The eleventh section of the tariff act of 1883, referring to the sanctity of treaty obligations, notwithstanding that act, was not intended to revive and set in motion the inert features of the Dominican treaty.

At Law.

In October, 1884, the plaintiffs imported from Puerta Plata, in the Dominican republic, two cargoes of sugar and molasses. The col-

lector assessed duties thereon pursuant to the provisions of Schedule E of the tariff act of 1883. 22 St. at Large, 488, 502. The plaintiffs protested, insisting that their importations should have been admitted free, under the stipulations of the treaty between the United States and the Dominican republic, concluded February 8, 1867. The ninth article of that treaty is as follows:

"No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican republic of any article the growth, produce, or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries." 15 St. at Large, 478.

Subsequently to the date of this treaty, congress, by various enactments, imposed duties on all sugar and molasses imported from foreign countries. On the thirtieth of January, 1875, a convention was concluded between the king of the Hawaiian Islands and the United States, by the first article of which it was stipulated that "for and in consideration of the rights and privileges granted by his majesty, the king of the Hawaiian Islands, in the next succeeding article of this convention, and as an equivalent therefor, the United States of America hereby agree to admit all the articles named in the following schedule, the same being the growth and manufacture or produce of the Hawaiian Islands, into all the ports of the United States free of duty." The schedule which followed contained, among other things, "muscovado, brown, and all other unrefined sugar, meaning hereby the grades of sugar heretofore commonly imported from the Hawaiian Islands, and now known in the markets of San Francisco and Portland as 'Sandwich Island sugar,' syrups of sugar-cane, melado, and molasses." It was provided by the fifth article that the convention should take effect as soon as approved and ratified, but not until a law to carry it into operation should be passed by the congress of the United States. The convention was ratified in 1875. 19 St. at Large, 625. On the fifteenth of August, 1876, congress passed the contemplated act, which provides, in substance, that whenever the president of the United States shall receive satisfactory evidence that the legislature of the Hawaiian Islands has passed laws to give full effect to the provisions of the convention, he is authorized to issue his proclamation declaring that he has such evidence, and from the date of such proclamation the articles mentioned in the schedule before named—sugar, molasses, etc.—shall be introduced into the United States free of duty. 19 St. at Large, 200. On the ninth of September, 1876, the president issued his proclamation, declaring that he had received the evidence required by the said act. 19 St. at Large, 666. In the tariff act of 1883—the act under which the plaintiff's importations were classified—congress declares that "there shall be levied, collected, and paid, on all articles imported from foreign countries, and men-

tioned in the schedules herein contained, the rates of duty which are, by the schedules, respectively prescribed." Schedule E provides for all sugars and molasses of designated grades.

The eleventh section of the act of 1883 is as follows:

"Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act; but whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated, the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage thereof." 22 St. at Large, 525.

The plaintiffs proved that the sugar and molasses imported by them would have been admitted free if they had come from the Hawaiian Islands. The defendant offered no evidence.

Henry E. Tremain, (*Charles Currie* was with him on the brief,) for plaintiffs.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

Coxe, J. In *Bartram v. Robertson*, 21 Blatchf. 211, S. C. 15 Fed. Rep. 212, this court decided that congress has power to annul a treaty, so far as it operates as a rule of municipal law; that the provisions of the Danish treaty, (8 St. at Large, 340,) which are similar to those now in question, and which, it was argued, admitted the productions of Denmark on the same terms as those of the Hawaiian Islands, could not be enforced, because, subsequent to the treaty, congress had imposed duties upon all sugar and molasses of designated grades. The general law included Denmark, and her products could not, therefore, be admitted free without an express legislative enactment. The court held, also, that even though the provisions of the Danish treaty were incorporated in the tariff law, it would not change the result; the fair meaning of the stipulation being that there should be no unfriendly discrimination against Denmark, and there is none when she is placed on an equal footing with all foreign nations, with one exception only. It was further held that, as the same stipulation, substantially, is found in upwards of 40 treaties, a construction which would exempt the products of these countries whenever similar products of a single country are exempted, is too startling to be entertained. The court should hesitate long before dealing such a staggering blow to our revenue. This decision was afterwards followed in *Whitney v. Robertson*, 21 Fed. Rep. 566, the Dominican treaty being under consideration. The latter case is in all respects similar to the case in hand, except that it arose prior to the act of 1883.

There may, possibly, be some difficulty in sustaining the proposition that the legislation since 1867, and prior to 1883, abrogated, suspended, or in any way affected the ninth article of the treaty. The

tariff acts of 1870, 1874, (Rev. St.) and 1875, though passed subsequently, cannot, it may be urged, be interpreted to suspend the ninth article, for the reason that there was nothing to give it vitality until the Hawaiian treaty was ratified. Then, for the first time, the stipulation providing for "no higher or other duty," etc., become operative. At the time the acts referred to were passed all sugar was dutiable, including "Sandwich Island sugar." The discrimination in favor of the Hawaiian Islands did not exist. The law-makers could not have had in mind the provisions of the Dominican treaty. All sugar was taxable, and therefore "all sugar" was included in the statute. The treaty and the tariff acts were not repugnant; both could stand at the same time. In other words, it cannot be said that congress, in 1870, intended to annul a provision which then had no operative existence, and could have none unless special privileges were, in the future, accorded to some other nation. If, for instance, in 1867, congress had passed a law providing that if at any time thereafter Hawaiian sugar should be admitted free, Dominican sugar, also, should be so admitted, there certainly is room to doubt whether such an act would be repealed or affected by the subsequent re-enactment of a general statute imposing a duty upon all sugar, Hawaiian and Dominican included. If, after or even at the time of the Hawaiian treaty, congress had imposed a duty upon Dominican sugar, or generally upon all sugar, excepting "Sandwich Island sugar," the argument that the law-making power intended to disregard the treaty obligations would then be well-nigh irresistible. But in the *Bartram* and *Whitney* cases there would seem, perhaps, to be some force in the proposition that the annulling or suspending legislation took place when there was nothing to suspend or annul, and when the provisions of the treaty could not have been present to the minds of the law-makers. Though the question, in this respect, may not be free from doubt, it is entirely clear that it is the duty of this court to follow the law as settled by these decisions. It is, indeed, freely conceded that they are controlling, and it is not easy to perceive why they do not dispose of the present controversy.

Leaving out of view, for the moment, all other considerations, by what process of reasoning can the court reach a conclusion favorable to the plaintiffs, and at the same time give force to the construction that the stipulations of the ninth article are satisfied when no unfriendly discrimination is made against the products and manufactures of the Dominican republic? Even though this article were incorporated *in hæc verba* in the act of 1883, so as to eliminate all questions as to its present validity and operative force, it would not avail the plaintiffs. If the rule of interpretation in *Bartram v. Robertson* is correct, the plaintiffs have no right to complain so long as they pay no higher duty than is imposed upon similar importations from other countries. The situation is not affected by the one exception in favor of the Hawaiian Islands. In other respects, too,

these decisions are precedents as controlling of a cause arising since the act of 1883 as prior thereto.

The only new element in the case at bar is found in the provisions of the eleventh section of that act. It is contended that by this legislation the dormant and moribund features of the treaty were revived, strengthened, and made operative. I cannot think that the court would be justified in giving to the broad and general language of the eleventh section a construction so radical and far-reaching. At the date of the act congress found the Hawaiian treaty in full operation,—a treaty affecting a group of lonely and isolated islands far out in the Pacific; a treaty by the terms of which the United States permitted certain articles to enter our ports free, upon the express consideration, however, that the Island ports should be open to a much larger number of articles, the growth or manufacture of this country. No other similar treaty was in operation. The courts had expressly decided that the convention with the Hawaiian Islands did not set in motion provisions similar to the one in question. If not annulled, they at least were suspended and disutilized. Dominican sugar had paid duties for 16 years. The aim of the law-makers was to preserve unchanged and unimpaired the existing state of things. It is hardly supposable that it was their purpose to make a sweeping change in the law; to open our ports, without advantage or consideration, to the products of many countries; to destroy a vast source of revenue; and to encourage fraud, by making the Dominican republic the dumping ground for the sugar and molasses of the West Indies. If this had been their design, they would have said so in language too plain and unequivocal to admit of doubt. It is thought, also, that there is force in the proposition that the provisions of the ninth article of the Dominican treaty amount simply to an agreement between the contracting parties not to discriminate against each other in the future by unfriendly legislation. The action of congress is necessary, and until such action is had the courts must follow the law as it is found on the statute books. *Taylor v. Morton*, 2 Curt. 454, 463.

The questions involved in this controversy are of such interest and importance that they will doubtless be presented for final settlement to the supreme court. Under existing law, however, it is not possible for the plaintiffs to recover. There must, therefore, be a verdict directed for the defendant.

DONOUGHE v. HUBBARD and others.¹*(Circuit Court, W. D. Pennsylvania. May 19, 1866.)*

1. PATENTS FOR INVENTIONS—HANDLES FOR CROSSCUT-SAWS.

Letters patent No. 78,653, issued June 9, 1868, (antedated May 19, 1868, to P. Donoughe, for an improvement in handles for crosscut-saws, construed and sustained.

2. SAME—NOVELTY—COMBINATION OF OLD ELEMENTS.

The arrangement of a wooden handle for crosscut-saws, with a threaded shank entering a securing nut in such handle, and having its lower end slotted to receive the end of the saw, a ferrule inclosing the lower end of the handle to prevent abrasion of the latter by the saw, and a washer loosely secured to this ferrule, presents a patentable combination; although each of the elements of the combination was old at the date of the invention, and the combination of several of them in saw handles was also old.

3. SAME—ANTICIPATION—PRIORITY—PRESUMPTION OF, FROM PATENT.

The rule is well settled that an anticipation, in order to defeat a patent, must be clearly made out. A patent raises a presumption of priority which can only be overcome by clear proof.

4. SAME—ASSIGNMENT BY ADMINISTRATOR—TITLE.

An assignment of a patent from the administrator of the patentee gives the assignee the title, unless a better title is shown in another.

On Bill, etc.

George Harding, Francis T. Chambers, and George M. Reade, for complainant.

Bakewell & Kerr, for respondents.

BRADLEY, Justice. This case, though a small one, has given me a great deal of perplexity. The patent sued on is dated June 9, 1868, and antedated May 19, 1868, upon an application which was sworn to October 3, 1865, and filed in the patent-office February 19, 1866. The drawings and model were filed at the same time, the printed copy of the file-wrapper to the contrary being a misprint. The application was at first rejected on the second of March, 1866; but upon a very slight alteration made in the claim, it was authorized to be issued in November, 1867, and was actually issued June 9, 1868.

The patent is for an improvement in handles for crosscut-saws, invented, as alleged, by Patrick Donoughe in 1864 or 1865. The improvement consists, as stated in the specification, in the combination and arrangement of a handle, ferrule, washer, screw-nut, and a shank furnished with an opening for the saw-blade, the whole constructed, arranged, and operating, as afterwards described, with references to the drawings. The handle described is the ordinary upright wooden handle used on crosscut-saws. Into this handle is inserted from below, a rod constituting the shank, provided with a screw-thread, working in a nut fixed in the interior of the handle, so that by turning the handle the rod is drawn up into it, or forced out, at will. The lower end of this rod or shank has a long narrow slot for receiving the end

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

of the saw. When the saw is inserted in the shank, it is drawn tightly up to the handle by turning the latter in the proper direction, so as to draw the rod or shank up into the handle. To protect the handle from wear and abrasion when the saw is drawn tightly against it, its lower end is provided with an iron ferrule, and between the handle and the saw is interposed an iron washer of the size of the end of the handle, and having a hole in the center for the rod to pass through. On its upper side this washer (when the saw is drawn tightly to its place) is in contact with the ferrule; on its under side it is in contact with the back of the saw. In order to prevent the washer from dropping down out of place, away from the handle, when the saw is lowered for removal, or when the shank is lowered to receive the saw, it (the washer) has a sleeve surrounding the hole in the center, which projects upwards, inside of the ferrule, where it is turned over or flanged out, so as to rest on a projection in the ferrule. The washer is thus loosely attached to the ferrule, and cannot drop away from it, although the ferrule may turn with the motion of the handle without turning the washer. This arrangement is described in the specification as follows: "The washer is placed in the ferrule, *b*, and is set or bent down on the flange of the ferrule, as represented in Fig. 1, but arranged so that it will turn in the ferrule with ease."

One of the features of this handle is that the rod or shank does not project above the handle, nor even pass through it, the upper end of the rod being concealed in the interior of the handle, and the top of the handle having the usual smooth and rounded appearance, so as not to injure the hand of the workman.

The claim of the patent is as follows: "What I claim as my invention is the arrangement of the handle, *a*, ferrule, *b*, washer, *c*, rod, *d*, and nut, *e*; the whole being constructed, arranged, and operating substantially as herein described, and for the purpose set forth." In other words, the claim is for the whole concrete thing, with all its parts, substantially as described. This is the form of the claim, and, in view of other saw handles previously patented, described, or in use, no broader claim could well have been allowed. Each part, and the arrangement of the parts, are essential elements of the invention. The use of all but one, omitting the one, would not be an infringement of the patent.

The first question to determine, therefore, naturally is whether the defendants do use the entire handle as described in the patent, with all its parts, and their arrangement; and I think this question must be answered in the affirmative. The handles made by the defendants, and for the making of which they are prosecuted in this suit, are such as are described in letters patent granted to one Elijah R. Osgood on the eleventh of November, 1879. The answer of the defendants states that the handles made by them were and are made in accordance with said letters patent, and these letters patent were put in evidence. Besides this, specimens of the handles made by the de-

defendants have also been produced in the case as exhibits. From this evidence it appears that the handles made by the defendants consist of a wooden handle, a ferrule, a washer, a screw-nut, and a shank having a slot for the saw, all having the mutual "arrangement," and "being constructed, arranged, and operating substantially as described, and for the purpose set forth," in Donoughe's patent. The only pretense of a variance is in the mode of connecting the washer to the ferrule, the connection being by means of a flange on the outside of the ferrule, over which a flange or brackets projecting from the washer are extended, so as to make precisely the same loose connection between the ferrule and the washer as is pointed out and provided for in Donoughe's patent. The difference is only in form. There is no difference in substance. Every element of the invention claimed by Donoughe, and patented to him, is contained in the defendants' handles. I think that the infringement is clearly made out.

The question next arises whether the patent is sustainable. Was it anticipated by prior inventions? or, if not, does it contain anything new that is patentable? Construed as we have seen the patent must be, the invention patented was clearly not anticipated by that exhibited in Holtzapfel's book, nor by Neimeyer's patent, or the handles of Neimeyer exhibited in the case, or by Stephen W. Hall's handle, as described in his rejected application, nor by the old snath-nib produced in evidence. Every one of these lacks something that makes an element in Donoughe's patent. The handle exhibited in Holtzapfel had no washer between the saw and the handle, and the rod passed entirely through the handle, and was secured in its place, and tightened upon the saw, by a nut at the top of the handle. The Neimeyer handle had no washer; the rod passed entirely through the handle, secured by a nut at the top, and the handle itself was divided into two sections, which revolve independently of each other,—all different from Donoughe's. Hall's saw handles, as described in his rejected application of 1860, did, it is true, have a nut in the interior, and a rod which did not pass through the handle, but it had no ferrule around the end of the handle, resting upon a washer; but the handle fitted in a cup or hollow formed in an iron clamp or shoe, which stood upon the saw, which clamp or shoe had a crease on its under side in which the top of the saw was inserted. This was a different arrangement from Donoughe's, although it is true that the clamp or shoe was interposed between the handle and the saw, and thus protected the handle from abrasion by the saw, and in this respect performed the office of a washer, and therefore may be called a "washer," or the equivalent of one; but it was not connected with the handle except as the end of the handle rested in the hollow formed in the top of it; but it was connected with the rod in this way, namely, the lower part of the hole in the clamp in which the rod was inserted was enlarged, and made square, so as to fit on to a square enlargement of the rod immediately above the slot. This adjustment kept

the crease for the saw in line with the saw, and prevented the clamp or shoe from slipping down the rod when the saw was removed. It is unnecessary to remark upon the snath-nib, as in that the rod passed through the handle, and it had neither washer or ferrule.

While none of the handles referred to exhibit in combination all the elements of Donoughe's, they nevertheless show that nearly all of these elements had been used in other combinations. The slotted rod, or shank for holding the saw, provided with a screw-thread to work in a nut fixed in or to the handle, for the purpose of drawing the saw up tightly to the handle, and even placing the nut in the interior of the handle so that the rod should not protrude at the top,—all these things had been invented and in use before the supposed invention of Donoughe, and it cannot be pretended that a ferrule was a new thing, or that a washer in contact with a ferrule was new. The truth is that all the elements of Donoughe's invention were old, and the combination of several of them, for the very purpose of being used in saw handles, had been made before his invention was conceived. This, at least, shows how little room was left for any invention to be made.

But the defendants contend that a still nearer approach to Donoughe's saw handle, amounting to substantial identity with it, was made by Emanuel Andrews in 1861 or 1862, by adding to Hall's saw handle, which he had purchased, a ferrule to protect it from abrasion in the clamp or shoe, and connecting it with the same. The purchase was made by Andrews from Hall in 1860, and he commenced the manufacture of saw handles at Williamsport in that year. He states in his testimony that soon after he commenced manufacturing he added a ferrule to the lower part of the handle to prevent the wood from wearing in the washer. Stephen W. Hall says: "I think the plain ferrule was applied by Mr. Andrews to the lower end of the handle in 1860 or 1861, and before 1862." He says it was a cast-iron ferrule, about two inches long, and was a tapered ferrule, the end turned down a little to fit in the washer; that is, as shown by the specimens produced, it tapered down like an inverted cane, the lower end being rounded off so as to fit in the hollow of the washer. Montgomery, a mechanical engineer, who was connected with Hall, says that he left Williamsport in April, 1864, and he saw Hall handles made by Andrews with ferrules on them before that; though, on cross-examination afterwards, he says he cannot positively say that it was before 1866, but his impression is that it was at the earlier date. He says that the Hall handle, with a ferrule, is practically the same as Donoughe's; both produce the same effect in precisely the same way, and by the same device. They each have a wooden handle, ferrule, washer, rod, and nut, all arranged, constructed, and operated in the same way, and producing the same effect. He calls the clamp or shoe a "washer." Andrews afterwards invented an improvement by providing the ferrule on the outside with

notches, or cogs, to which a thumb-screw was applied to hold the handle fast, and prevent it from turning while the saw was being operated. For this improvement Andrews applied for a patent, the application being sworn to on the nineteenth of April, 1866. A patent was granted October 9, 1866. He states that after using this improvement for some time he returned to the use of the Hall handle with a smooth ferrule, which was prevented from turning while the saw was in operation by making the thread screw on the rod left-handed instead of right-handed.

Some testimony was adduced tending to show that Andrews did not use a ferrule on the Hall handle until he made the cogged ferrule for which he got a patent; and that when he found this to be an inconvenient apparatus, he hit upon the use of the left-handed screw, and then put a long plain ferrule on the Hall handle. If this is true, of course Andrews, Hall, and Montgomery must be mistaken in their recollection, and the alleged anticipation fails. The cogged ferrule itself cannot be set up against Donoughe's patent, because, if it sufficiently resembled Donoughe's handle, there is no clear proof that it was invented by Andrews before Donoughe invented his.

The testimony referred to as tending to show that Andrews did not use a ferrule on the Hall handle until he made the cogged ferrule, is that of his brother, Joseph Andrews, Edward C. Johnston, and Charles Hall, a son of Stephen W. Hall.

Joseph Andrews was a brother of Emanuel Andrews and says he was a foreman in his brother's shop from February, 1860, until April, 1861, and again in the following winter, and from thence, with the exception of short intervals, until 1874. He says that they manufactured the Hall handle without a ferrule until the adoption of the cogged handle in the winter of 1865 or spring of 1866; that he never saw a handle with a smooth ferrule in the shop before that; that after making the cogged handle for about two years his brother adopted the long ferrule to take the place of the cog and thumb-screw, and put a left-handed thread on the rod or bolt.

E. C. Johnston was a machinist who did work for Emanuel Andrews, at sundry times from February, 1865, and had his shop part of the time in Andrews' factory. He had also been engaged with Stephen W. Hall, and knew about the saw handles that Hall and Andrews manufactured. He is equally positive with Joseph Andrews that Emanuel Andrews made no handles with ferrules on them before making the cogged ferrules in the early part of 1866. He never saw or heard of handles with smooth ferrules until after the cogged ferrules were superseded by them. The only handles he knew of Hall or Andrews making—the only ones he had ever seen before that—were the Hall handles without ferrules, and the Andrews handles with the corrugated ferrules.

The testimony of Charles Hall corroborates that of Joseph Andrews and E. C. Johnston. He worked in Andrews' shop from the

spring of 1867 to the spring of 1877. He says they were making the cog handle until they got in the new shop in 1868; after that they used the long smooth ferrules. He had never seen a smooth ferrule prior to that.

The evidence, taken altogether, is not sufficient to establish an anticipation of Donoughe's invention by Andrews. The preponderance is rather against the use of a smooth ferrule by him prior to 1868. The rule is well settled that an anticipation, in order to defeat a patent, must be clearly made out. A patent raises a presumption of priority, which can only be overcome by clear proof.

Some reference was made on the argument to the supposed part which George B. Hubbard took in making the invention. I have examined the testimony on that subject, and do not see that it materially affects the originality of Donoughe, or his title to the invention.

There may be some question whether what Donoughe did was patentable, but I am inclined to think it was. The complete handle, with all its parts and their arrangement, when it was finished, was certainly a very useful thing, and was a great improvement on former handles. As a whole, I think it showed invention, and that it was patentable.

I have examined the objections raised to the complainant's title. It does not seem to me to be well founded. The complainant has an assignment of the patent from the administrator of his father, the patentee, dated November 22, 1881. That certainly gives him the title, unless a better is shown. No better is shown. The assignment itself, it is true, states that the patent was set off to the widow of the patentee under the exemption laws; but, in the same sentence, it says that she, in her life-time, assigned it to the complainant, and the assignment itself, dated in 1872, was produced and proved. The alleged transfer by the complainant of the right for Pennsylvania to Fiske, in 1876, is met by proof of a retransfer by Fiske to the complainant in May, 1881, with an assignment and transfer of all damages, money, and right accrued in consequence of any infringement.

A decree will be entered for the complainant, with a reference to a master to ascertain the profits and damages sought by the bill, according to the prayer of the same.

MORRIS v. KEMPSHALL MANUF'G Co. and others.¹*(Circuit Court, D. Connecticut. 1886.)*

PATENTS FOR INVENTIONS—SASH FASTENERS.

Letters patent No. 212,487, of February 18, 1879, to John B. Morris, for an improvement in sash fasteners, *held* limited by the prior art to the specific construction it describes, and not infringed by fasteners made under letters patent No. 294,506, of September 4, 1883.

In Equity.

Samuel D. Cozzens, for plaintiff.

Charles E. Mitchell, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the alleged infringement of letters patent, No. 212,487, dated February 18, 1879, to the plaintiff, for an improvement in fasteners for meeting rails of sashes. The plaintiff had received a patent, (No. 205,568,) dated July 2, 1878, for a sash-fastener, of which the following general description was given by the plaintiff's expert:

"The mechanism described in this patent consists of a latch-bar, swinging on a vertical pivot on a plate for attaching it to the upper rail of the lower sash, the said swinging latch-bar having a gravitating catch, and the plate or notch or shoulder with which said catch engages, to hold the bar in its locked condition; the latch-bar having also a vertical lip on its outer end, engaging in the rear of a curved spur or hook fixed to the upper surface of the bottom rail of the upper sash, beneath which spur the latch-bar engages to prevent the sash being raised, while the hook or lip on the extremity of the latch-bar engages behind the spur on the upper sash in order to prevent the forcing of the sashes apart horizontally."

The patent of 1879 was an improvement upon the patent of 1878 in three particulars, which are described by the patentee in his specification as follows:

"The improvement hereinafter described is designed to enable the latch-bar to be securely set or fastened in the unlocked or locked position, at will, and to be usable with sashes of various sizes. My improvement further comprises a construction of latch-bar and supporting-plate which secures the arrest of the bar at the extremities of its stroke or swing, without the use or necessity of any projection from the general level of the plate top. My improvement further comprises a construction of latch-bar and of the engaging spur or hook whereby the heel of the bar is duly supported without necessitating the use of a hard core in moulding the said hook."

The first part of the improvement was effected by a base-plate, elevated so high above the lower sash that the hinged pendant could not strike against it, but would fall into the locking notch upon the front edge of the plate, and also into a sloping jog on its right side, which receives and retains the pendant when the latch-bar is in the open position. The second part was effected by making another bevel-jog

¹Edited by Charles C. Linthicum, Esq., of the Chicago bar.

on the left side of the elevated plate, which jog received a projection from the under side of the latch-bar. This projection limits the swing of the bar. The third part was effected by cutting away the base-plate of the hook in a sloping form, so as to leave an open space beneath the hook, for the purpose of enabling it to be moulded without a core. Inasmuch as this shape would leave the rear end of the latch-bar unsupported, the patentee says: "I form on said rear extremity a heel or prolongation, *f'''*, which rests upon the bed-plate, *G'*, in the locked condition of the fastening."

The two claims of the patent are as follows:

"(1) The improved sash lock or fastening, consisting of the elevated plate, *C*, having shouldered notches, *c'*, *c''*, *c'''*, pivot, *E*, for swinging latch-bar, *F*, *f*, and the hinged pendant, *H*, for attachment to the lower sash, in combination with a stationary spur or cam hook upon the upper sash, substantially as set forth. (2) The combination, with the spur or cam hook, *G*, upon base-plate, *G'*, constructed with an open space beneath said hook to enable the part to be moulded without a core, of the swinging latch-bar, *F*, having lip, *f*, and projection, *f''*, adapted to project beyond the open space, and furnish a support for the latch-bar, substantially as described."

The important feature of the improvement was the elevated base-plate with the shouldered notches upon its edge, into which the hinged pendant could fall and swing clear of the sash-rail. A hinged pendant, which fell into notches in the base-plate, and thereby secured the fastener, was old at the date of the Morris invention, and is shown in Exhibit "Old Gravity Sash-lock."

The defendants' sash-fastener is made under letters patent issued to the Kempshall Manufacturing Company, as assignee of William E. Sparks, on September 4, 1883. "The important portion of the Sparks invention is a flange or cap, which is preferably made integral with the post upon which the sweep is pivoted, and which is provided with two shoulders or notches, *K*, made in the edge of the flange. When the sweep is brought to the front the handle end of its latch, which is heavy enough to overbalance the inner end of the latch, causes the latch to drop, and thereby the inner end is raised into engagement with one of the shoulders, and the sweep is locked. The invention consists, in substance, of the pivoted latch of the sweep, which locks into notches in the edge of the flange at the top of the post upon which the sweep is pivoted, and above the sweep." *Morris v. Kempshall Manuf'g Co.*, 20 Fed. Rep. 121.

The plaintiff insists that the plate and the pendant or latch of each fastener are the same, and that the notches in the flange of the Sparks post are the equivalent of the notches in the base-plate of the Morris device. If Morris had been the pioneer in the construction of sash-fasteners by means of a hinged pendant falling into notches upon the base-plate, the plaintiff would have a strong position; but, inasmuch as the "gravity sash-lock" preceded him, and contained a hinged pendant and a notched base-plate, it is giving the plaintiff's patent too broad a construction to allow it to cover notches not upon the

base-plate proper, but upon the post or pivot of the latch-bar, into which a weighted latch falls, although the base-plate may be elevated.

The first claim of the plaintiff's patent must be construed in accordance with the extent of his invention, which was a base-plate elevated above the lower sash, so that the hinged pendant could engage with notches upon the base-plate proper, irrespective of the thickness of the sash, and cannot cover a fastener, although having a plate elevated above the lower sash, which fastener is furnished with a weighted latch which engages with notches on the edge of the flange at the top of the post above the sweep.

The second claim is, in general, for the cam-hook or keeper upon its base-plate, which is so cut away underneath as to enable the hook to be cast without a core, in combination with the latch-bar having a lip, and also a projection to project beyond the open space, and furnish a support for the latch-bar. I doubt whether this construction contains a patentable invention. The "undercutting" of the front of the base-plate, and the corresponding lengthening of the latch-bar, hardly seem to deserve the name of invention, in view of the many mechanical arrangements of this sort which are known to workers in metals. But, if it is technically patentable, the defendants' fastener does not have such a rearward projection as the patent calls for, but has the latch-bar of the customary style of construction.

The bill is dismissed.

CELLULOID MANUF'G Co. v. AMERICAN ZYLONITE Co. and others.¹

(Circuit Court, S. D. New York. June 15, 1886.)

PATENTS FOR INVENTIONS—PETITION FOR REHEARING.

Petition for rehearing, upon the ground of newly-discovered evidence on the question of public use, denied, and the opinion expressed on the former hearing, 26 Fed. Rep. 692, adhered to.

Petition for Rehearing.

Horace M. Ruggles and Benj. F. Thurston, for the petition.

Frederic H. Betts and Wm. D. Shipman, against the petition.

SHIPMAN, J. This is a petition by the defendants for a rehearing, upon the ground of newly-discovered evidence upon the question of the public use in this country of the patented invention for more than two years before the application for a patent. The affidavits show that more dental plates were sold by the Albany Dental Plate Company before October, 1872, than I had supposed, and that all were not of poor quality, and that the patentees caused to be issued, in

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

1871 and 1872, laudatory advertisements in regard to the perfection of their celluloid dental plates, and that some dentists thought them satisfactory. Their advertisements and opinions do not make much impression upon my mind, because I am somewhat familiar with the opposition of dentists to the dental vulcanite patent. I am satisfied that this defense, always one which must be clearly proved, cannot be made out, because I do not think that the inventors, before they started their Newark factory in the spring of 1873, were themselves sure how to obtain a result which should be both certain and satisfactory, and I do not think that they attained, prior to 1873, any uniformity of result, either good or poor, except in the minds of persons who were very anxious that celluloid should be a success. The affidavits upon both sides, taken as a whole, tend to confirm my previous opinion that this defense cannot be sustained.

The petition for rehearing upon the ground of newly-discovered evidence is denied.

THE OREGON.¹

HOLT and another v. THE OREGON.

(District Court, E. D. Wisconsin. May 3, 1886.)

1. COLLISION—SCHOONER UNDER SAIL AND Schooner IN TOW—ERROR IN LOCATING VESSELS BY SOUND—CHANGE OF COURSE IN FOG.

During a dense fog a collision occurred between the schooner M. and two other schooners in tow of the steamer O. The fog signals of both the steamer O. and the schooner M. were sounded as required by statute, but the M.'s horn was not heard by the O. The O.'s whistle was heard by the M., and endeavors were made to determine her bearing by locating the sound. The O. was first seen by the M. when about 50 feet distant. From the presumed direction of the sound, it was supposed by the M. that the O.'s course was astern of the M., and, as the latter vessel was sailing at a moderate speed, close-hauled, on the starboard tack, no change of course was made until the O. was actually seen. *Held*, that as the steamer's lights could not be seen, sound formed the only guide furnished the M., and that an error in locating sound, under the circumstances, was not a fault; and that as the M. was sailing at a moderate speed, close-hauled, on the starboard tack, the circumstances were such that the master of the M. was justified in concluding that a change of course might increase the hazard.

2. SAME—LIGHTED TORCH—FAILURE TO EXHIBIT, WHEN JUSTIFIED.

The schooner failed to show a lighted torch. It was not proven, to the satisfaction of the court, that the torch, if shown, might not, *possibly*, have been seen. *Held*, that though it be possible that the torch, if shown, might not have been seen far enough off to have done any good, such a possibility furnished no excuse for its absence. Nothing short of an absolute certainty that it could do no good, to be established by proof on the trial, can justify an omission to obey the rule.

3. SAME—FAILURE TO KEEP OUT OF THE WAY, PRIMA FACIE PROOF OF FAULT ON PART OF STEAMER—SPEED IN FOG.

The steamer's speed was diminished upon the coming up of the fog. According to the testimony of her crew, she was, at the time of collision, steam-

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

ing at from three to four knots per hour. According to the testimony of the M.'s witnesses she was steaming at from seven to nine knots per hour. *Held*, that the occurrence of the collision, under the circumstances, was sufficient to establish a *prima facie* case of negligence on the part of the steamer; and that the density of the fog, the locality, and the position of the tow, required an occasional stoppage, in order to listen for sounds from vessels that might possibly be approaching. Both vessels held to be in fault, and damages divided.

In Admiralty.

Markham & Noyes, for libelants.

Harvey D. Goulder, for claimants.

DYER, J. On the nineteenth day of June, 1885, the schooner *Richard Mott* set sail from Oconto, laden with a cargo of lumber, bound for Milwaukee. Towards midnight the skies became overcast, and there came up a dense fog, accompanied by rain. The wind was from the south, and was a good sailing breeze. The vessel was sailing by the wind, on the starboard tack, steering S. E. by E., and was carrying full sail. The fog-horn was constantly sounded, and the lights were in their places, and burning brightly. It was mate's watch, consisting of mate, wheelsman, and lookout. At 11:30 o'clock the master came on deck because the weather was thick and threatening. In obedience to his orders, the watch below were called to shorten sail. The whistle of a steamer was heard, apparently at considerable distance, bearing southwest, and then a little more westward, from the *Mott*. Sail was taken in, the vessel keeping her course, and the steamer's whistle continuing to be heard. No lights were seen, when suddenly the steamer, which proved to be the *Oregon*, loomed up in the fog, passing within about 50 feet of the schooner's bow. A hail was heard from the steamer to the effect that she had a tow, and to put the wheel of the *Mott* hard down. This was done, and she came up in the wind. Almost immediately the first schooner in tow of the *Oregon*, which was the *Cyclone*, struck the *Mott*, carrying away her jib-boom. Then the second schooner in the tow, which was the *Locke*, in a moment or two struck her a second blow, raking her fore and aft, from stem to stern post, doing serious damage. Both blows were received by the *Mott* on her port side, as she was standing in the wind heading nearly south. The collision occurred about 15 or 20 minutes past midnight, Milwaukee time,—perhaps a few minutes later. For the injury thus occasioned the libelants seek to recover damages, and the question is, which vessel, if either, was in fault?

1. Was the steamer chargeable with negligence? It is insisted on the part of the claimants that, so far as she was concerned, this was an inevitable accident. In the case of a steamer having opportunity to know that a sailing vessel is approaching, the rule is that the steamer is bound to keep out of the way. Whatever is necessary for this, it is her duty to do. *The Funnie*, 11 Wall. 240. When a

steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision, and if this be not done, *prima facie* the steamer is chargeable with fault. *The Oregon*, 18 How. 570. In the case of *The Carroll*, 8 Wall. 304, it was said: "As the steamer did not keep out of the way, and as the collision did occur, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner." Many other cases to the same effect might be cited.

The Oregon, with her tow, was on a voyage from Milwaukee to Escanaba, and was heading about N. N. E. I do not think she changed her course after her whistle was first heard on the Mott, as was supposed by the master of the Mott. The testimony on the part of the claimants is positive that she did not. The course of the wind may have been such as to carry the sound of the whistle more to the westward than northward, and thus to mislead those on the Mott. Her lights were in place, and burning, as were those on the vessels in tow. Her fog-whistle appears to have been diligently sounded at frequent intervals. There was no omission of duty in these respects. The fog-horn of the Mott was not heard until the vessels were in sight of each other, and close together. This would naturally suggest a negligent lookout, and it appears that the person serving in that capacity was a young man less than 19 years old. But the master and mate were also on watch, and the testimony is direct and positive that attention was given to fog signals, and that none were heard. As the wind was from the south, its tendency would be to carry the sound of the Mott's horn away from the Oregon, and make it more difficult to hear on the steamer. Then, the master says the machinery of the boat made a good deal of noise, and thus it is easy to see that the situation was not favorable for hearing sounds from an approaching vessel.

Without imputing fault to those on board the Oregon on either of the grounds already mentioned, I am still of opinion that the fact of the collision cannot be reconciled with the exercise of due care on the part of the steamer. Notwithstanding the testimony which tends to show that her speed was checked after the fog came on, I cannot resist the belief that she was going at greater speed than was consistent with safety, and that this was the prime cause of the colliding vessels being brought into dangerous proximity. The master says the fog was so dense that he could not see the tow behind him. As the steamer had a tow of two schooners, there was imposed upon her the necessity and duty of greatly increased vigilance and care since there was liability to collision with the vessels in tow as well as with the steamer itself. In the case of *The Favorite*, 10 Biss. 536, S. C. 9 Fed. Rep. 709, it was held by Judge BLONDELL that the fact that a steamer has barges in tow does not alter the rule requiring her to keep out of the way of an approaching sailing vessel, and that in such a case

the steamer should take extra and timely precautions to avoid a collision. In effect, the same ruling was made in *The Civiltà*, 103 U. S. 699. The chief engineer of the Oregon says she was running between three and four miles an hour; but he was not on duty, and merely looked out of his room, where he had retired for the night, and made a hasty observation. The second engineer places the speed of the boat at three or three and a half or four miles an hour. The mate of the Locke says her speed was probably five miles an hour. The master of the Cyclone thinks it was three or four miles, and the master and lookout of the Oregon say it was four miles an hour. The master, mate, and lookout of the Mott testify, from their observations of the steamer as she passed, that she was going from seven to nine miles an hour. Thus the estimates of speed per hour vary from three to nine miles. The schooners in tow were sailing light. At the time of the collision the steamer was under sail as well as steam-power, carrying fore and main sail. The Locke was carrying foresail, mainsail, stay-sail, and two jibs. Whether the Cyclone was under sail does not appear. The wind was free for the steamer and her tow. The master of the Oregon says her sails were not drawing, but why were they up, if not to add to the propulsion of the boat? These are facts which tend to show that the speed of the Oregon and her tow was greater than is stated by the respondent's witnesses. If, instead of driving through a fog as dense as then prevailed, the steamer had stopped, even for a few moments, the noise of the machinery having ceased, the fog-horn of the Mott would probably have been heard. The master knew he was in a locality where there was liability to meet passing vessels.

The violence of the blows received by the Mott furnishes further evidence of the speed of the steamer and her tow. The Cyclone carried away her jib-boom, and, as I infer from the evidence, quickly passed on out of sight in the fog. The blow of the Locke, according to the testimony, carried away bowsprit, knight-heads, rails, stanchions, bulwarks, plank-sheer, four streaks of plank below the plank-sheer, the anchor stock, fore and main rigging, chain-plates and lanyards, and fore, main, and mizzen topmast rigging, raking the vessel fore and aft.

Added to all this is the fact that the collision with the two vessels in tow occurred in rapid succession. The mate of the Locke says he heard a noise up ahead, which was when the Cyclone struck the Mott, and then, to use his own language, "in a second or two the Mott was right under our lee bow." He says, further, that the collision between the Mott and the Locke was within a minute, or a minute and a half, after he heard the noise on the Cyclone. The length of the tow line between the Oregon and the Cyclone was 300 feet. The proofs do not show the length of the line between the Cyclone and the Locke; but the blows of the two vessels in tow were evidently in very quick succession, and it is fair to assume that the length of the line

between the Cyclone and Locke was equal to that between the Cyclone and the Oregon. Thus, the facts and circumstances attending the collision point to the conclusion that such caution was not used in the matter of speed as the situation required. In so dense a fog, especially as the steamer had vessels in tow stretching out 500 or 600 feet behind her, I think it would hardly be unreasonable to say that it was her duty to stop long enough to listen for sounds from vessels that might possibly be approaching. At any rate, she could only properly run at such speed as would enable her to stop as soon as the close proximity of a vessel was known.

In the case of *The Pennsylvania*, 19 Wall. 125, the supreme court said that what is moderate speed "may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of vessels is increased. In the case of *The Europa*, Jenkins, Rule of the Road at Sea, 52, it was said by the privy council: 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precautions at the moment she sees danger to be possible; and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour. * * *'" "And," says the court further, "even if it were true that such a rate [speaking of seven miles an hour] was necessary for safe steerage, it would not justify driving the steamer through so dense a fog, along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to."

In the case of *The Western Metropolis*, 7 Blatchf. 214, Woodruff, J., held that if the night was either so dark or so foggy that, by slowing, stopping, and backing as soon as the schooner was observed, the collision could not be avoided, then the steamer was moving at too great speed.

The case of *The Eleanora*, 17 Blatchf. 88, is directly in point upon this question. There, as appears by the opinion of Judge BLATCHFORD, then judge of the district court, (pages 91, 92,) the steamer, when the fog, which was very dense, came on, reduced her speed to five and a half miles an hour. The master, first mate, two seamen, and a lookout were listening attentively for sounds of fog-horns, and looking attentively for lights. Neither the steamer nor the vessel collided with became conscious of the presence of the other until just before the collision. Judge BLATCHFORD said:

"If the steamer had been going at less speed, or had gone ahead a short distance, and then stopped still and listened, and thus made her speed, or her passage from point to point through the intervening space, and not merely her running rate while in forward motion, that 'moderate speed' which the

statute requires, it is quite apparent that, blowing her whistle continually, at proper intervals, the blast would have been heard by the schooner, and answered by the fog-horn over the starboard side of the schooner, in sufficient season for the steamer to have stopped and backed, and be brought to a stand-still, before reaching the schooner. Therefore the steamer was in fault as to her speed."

This view was approved on appeal by Mr. Chief Justice WAITE, who said:

"A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed, and is never justified in coming in collision with another vessel, if it be possible to avoid it. This implies such a speed only as is consistent with the utmost caution. Having complete control of herself, and being capable of so much damage if a collision does take place, the law has imposed on her the obligation of so directing her own movements, in the midst of the uncertainties of a fog at sea, as to be at all times under easy command. If she fails in this, she must suffer the consequences. Her rate of speed must be graduated according to the circumstances. The more dense the fog, the greater the necessity for moderation. The object is to keep her, if possible, under such control that she can be stopped after another vessel, with which she is in danger of collision, may be seen, or otherwise discovered."

This case in many of its material facts is remarkably similar to that at bar with respect to both the speed of the steamer and the duty of the schooner to display a torch light, and may well be considered authoritative upon the questions decided.

2. Was the Mott in fault? The testimony shows, in the first place, that she was sufficiently manned, and that the measures which were taken by the master for her safe navigation were such as good seamanship prompted. When he came on deck at 11:30, which was at least 45 minutes before the collision, he took a position on the roof of the cabin, and, after the necessary observations, and before the Oregon's whistle was heard, he directed the watch below to be called to shorten sail. The mizzen-sail was reefed, and the light sails were clewed up. All hands were on deck, and were engaged in this work, except the mate, wheelsman and lookout, who were at their respective posts of duty. The master says he ordered this to be done so that fog-whistles might be more plainly heard and sounds located. He further testifies that he took the bearings of every whistle of the Oregon, and that when he heard the first whistle it bore south of the Mott. The next appeared to bear a little west of south, and another S. W. by W. from the Mott, two or two and one-half points abaft of her beam. In this he is corroborated by others of the crew, who heard the whistle, and noticed its bearings, but probably not with the care of the master. He says he concluded the steamer was going west, and astern of his vessel, and that therefore it was safe for the Mott to keep her course. Although the courses and distances of sound in such circumstances are apt to be misleading, from the best evidence the master had of the location of the steamer, and with the

care he exercised, I think he was justified in continuing on his course. Erroneously locating a vessel by the sound of her whistle in a fog is not necessarily a fault. *The Lepanto*, 21 Fed. Rep. 656.

Lights could not be seen. The master had to be guided by sound. His vessel was on the starboard tack, and the circumstances might well lead him to the conclusion that a change of course would increase the hazard. The Mott was going at a moderate rate of speed, and as soon as the master knew of the immediate proximity of the steamer, and perceived that a collision was imminent, he put the wheel of his vessel down, and luffed her up into the wind. Upon the liability to mistake, and the possible causes of mistake, in locating a vessel by the sound of her fog signals, see the very interesting opinion of Judge Brown, of the Southern district of New York, in the case of *The Lepanto*, *supra*.

Upon a careful examination of the evidence, I am convinced that there was no neglect on the part of the lookout of the Mott in the use of the fog-horn. Before the master came on deck, and from the time the fog came on, the horn was sufficiently sounded. The lookout stood forward on the starboard side. It is true that the mate and lookout, before the watch below were called, took in the jib topsail and fore gaff topsail, but this was at about 11:30 o'clock, and before the whistle of the Oregon was heard; and, according to the testimony, the lookout was thus engaged only two or three minutes, and the work did not call him but a few feet away from the place on deck which he occupied as lookout. When the whistle of the Oregon was first heard the master says he directed the lookout to blow long and distinct blasts, and that this was done. The second mate and the lookout went out on the jib-boom, and furled the jib topsail while others of the crew were doing other work on deck, but during this time the mate had the horn, and continued the blasts at short and regular intervals. This was about 12 o'clock, and a careful review of the evidence satisfies me that there was no want of diligence in the use of the horn from the time the fog came on, soon after 10 o'clock, down to the time of the collision.

The Mott did not show a torch light, and, under the decisions, this, I think, was a fault which throws upon her a share of the responsibility for the collision. Section 4234 of the Revised Statutes provides that every sail-vessel "shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching." It is only where it clearly appears that the exhibition of a torch-light could not have served any useful purpose, or given any additional information as to the position or course of a sailing vessel, that the omission to comply with this section can be held to be immaterial. *The Margaret*, 3 Fed. Rep. 870; *The Leopard*, 2 Low. 241; *Kennedy v. The Sarmatian*, 2 Fed. Rep. 911. If it is doubtful whether the exhibition of a torch-light would or would not have conveyed information to the

steamer for avoiding a collision, then the doubt must be resolved against the vessel which failed to comply with the statutory requirement. I cannot find as a fact in this case that a torch shown by the Mott would not have been seen by those on board the Oregon; and for this reason, if for no other, I must find the Mott guilty of contributory fault. *The Crawford*, 6 Fed. Rep. 911; *The Excelsior*, 12 Fed. Rep. 203.

The witnesses differ as to the distance a light could be seen on the occasion in question. The second mate of the Mott says the lights of the steamer could not be seen plainly 200 feet away. The lookout says a torch-light could not have been seen through the fog more than the distance of a vessel's length. The master places the distance at 100 feet. The master of the Oregon thinks it might have loomed up 500 feet off. The master of the Mott knew, from the repeated whistles, that there was a steamer in the neighborhood. He could not locate her, but he had occasion to know that it was possible she might be near by, although the sound of her signals indicated that she was going off to westward. It was an occasion for the greatest precaution.

In the case of *The Eleanora*, *supra*, the schooner had her colored lights set and burning, but Judge BLATCHFORD found as a fact that they were not seen at any time from the steamer, nor could they, or the lights of the steamer, have been seen, in such a fog as prevailed, at any useful distance. The master of the schooner came on deck very shortly before the collision. The persons on deck were listening and looking. They had a fog-horn, and it was being blown at proper intervals. In the opinion of the court, Mr. Chief Justice WAITE said that the schooner "was sailing in what she knew, or ought to have known, was a common thoroughfare of approaching steam-vessels at the time. Their fog signals were heard from various directions, and she was heading on a course crossing their regular tracks. The statutory rule is imperative. * * * No sailing vessel has a right to disregard this regulation because she thinks it unimportant. If she knows of the approach of a steam-vessel, she must exhibit the light, or take the risks of loss occasioned by its absence. * * * If exhibited, possibly the torch might not have been seen far enough away to have done any good, but such a possibility furnishes no excuse to the vessel for its absence. Nothing short of an absolute certainty that it could do no good, to be established by proof on the trial, will justify an omission to obey the rule. In a fog, all vessels must do all that is required of them by law or usage. While more is demanded of a steamer than a sailing vessel, it is as important that the sailing vessel should obey all the rules prescribed for her as that the steamer should not neglect those which are to govern her. Actual safety is dependent upon a strict performance by each of all their respective duties. * * * It was not proper to assume that the torch-light would have done no good. It was her duty to exhibit such a

signal, and, under the circumstances of the case, I cannot but consider it a fault that she omitted to do so."

Applying to the case in hand the rule thus laid down, the conclusion must be that the Mott cannot be exonerated from fault in the respect named.

As the Oregon and the Mott are both found to have been in fault, let there be a decree dividing the damages.

THE ALPHA.¹

THE ONEIDA.

THE MANITOWOC.

TISDALE v. THE ALPHA and others.

(District Court, N. D. New York. June 2, 1886.)

COLLISION—VESSELS IN TOW—MANEUVER IN EXTREMIS—STRENGTH OF HAWSER—UNNECESSARY AND EXTRAORDINARY STRAIN.

The canal-boat B., owned by the libelants, collided with the barge M. Each vessel was in charge of its own tug, and both were without other motive power. When about one-fourth of a mile apart, and in mid-channel, signals were exchanged. When a few hundred feet to the westward of libelants' ship, the M.'s hawser parted, and she was forced obliquely across the river, and collided with the G. The libelant's tug maneuvered in accordance with the course indicated by signal until after the parting of the hawser, and, when confronted with the sudden peril incident thereto, the master of libelant's tug used his best judgment in maneuvering. The collision was caused by subjecting the M.'s hawser to an unusual and extraordinary strain, in consequence of which it parted. *Held*, that the master of libelant's tug was justified in presuming that the M.'s tug would take the course indicated by signal, and was under no obligation to stop or to maneuver as if anticipating an accident, and that, when confronted with a sudden peril, the only obligation imposed by law was the use of his best judgment. *Held, further*, that if the hawser was strong enough to stand any ordinary strain, and if it was, without cause, subjected to an extraordinary strain, the M.'s tug was chargeable with negligence.

In Admiralty.

Benjamin H. Williams, for libelant.

Josiah Cook, for the Alpha.

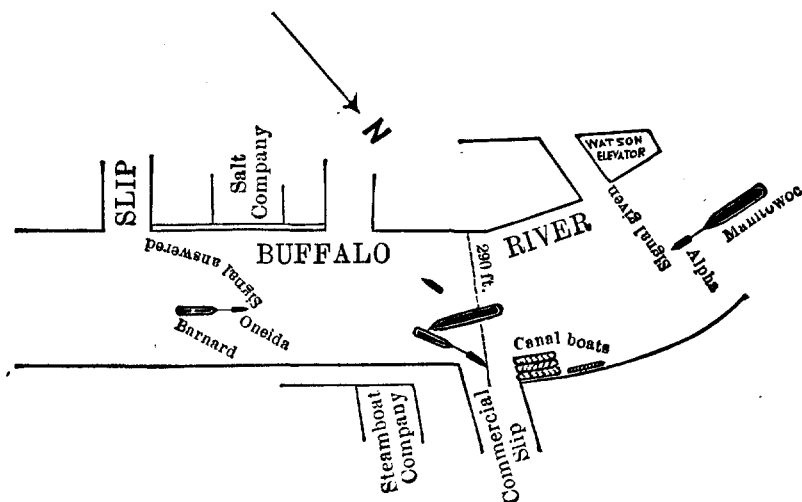
George Clinton, for the Oneida.

Willis O. Chapin, for the Manitowoc.

COXE, J. This is a collision case. On the thirteenth of May, 1885, the loaded canal-boat George Barnard, owned by the libelant, was proceeding down the Buffalo river in tow of the steam-tug Oneida, destined for the Erie canal via the Commercial slip. At the same time the tug Alpha was steaming up the river, having in tow the

¹Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

Manitowoc, a large barge, 225 feet long, and 25 feet and 9 inches beam. Both the canal-boat and the barge were without motive power, and each was wholly under the control of its respective tug. When the tugs were about a quarter of a mile apart, and nearly in the center of the river, the Alpha gave one blast upon her whistle, and was answered by a corresponding blast from the Oneida. This signal meant that the Alpha would go to the right, and that the Oneida must do the same. The latter's response indicated that she understood the Alpha's signal, and would do as requested, viz., keep to the right. When a few hundred feet west of Commercial slip the Alpha permitted the Manitowoc to run ahead of her, the line between them parted, and the barge, being thus adrift and uncontrollable, proceeded obliquely across the river, and struck the canal-boat on her port quarter, just abaft of the cabin, causing the injuries complained of. The river at the point of collision is about 290 feet wide. At the north-west corner of the Commercial slip three canal-boats were lying abreast, extending about 54 feet into the channel. The following diagram may serve to illustrate the situation:



The collision was not inscrutable. Some one was at fault. Who was it? No negligence is imputed to the Barnard. She did all that was possible to avert the accident. This was practically conceded on the argument. Regarding the Oneida, also, the proof discloses no well-founded accusation. It is said that the accident might have been avoided if she had stopped, or passed on down the river between the canal-boats and the Manitowoc, or turned to the left, and passed the barge on her starboard side. The difficulty with this reasoning is that it assumes that the Oneida knew, or had reason to suspect, that the barge's line would part, and leave her helpless and unmanageable opposite the entrance to the slip. The Oneida presumed, and was

justified in presuming, that the Alpha would take the course indicated by her signal, and go to the right. Had she done so there would have been no danger. The Oneida was on her own side of the river. She was proceeding in a proper manner and at an ordinary rate of speed. It would be a new and startling proposition in maritime law for the court to assert that it is the duty of vessels meeting in a wide water-way to stop when a quarter of a mile apart. If such a rule were enforced the vessels of our inland commerce would soon be "rotting at the walls." After the line parted, the danger was imminent. There was no opportunity for nice and accurate calculations. If, confronted with this sudden peril, the master of the tug used his best judgment, it was all the law required of him. But the course he did take was, in the circumstances, the wisest for him to pursue. The Barnard almost escaped as it was. Had the Oneida attempted any of the maneuvers now suggested, the probability is that the disaster would have been more serious.

Coming now to the Alpha and the Manitowoc, it should be remembered that the latter was a large, heavily laden barge, depending solely upon the tug for locomotion. She was helpless the moment she was cast loose. It can be confidently affirmed, then, that the accident happened because the line parted. Through whose negligence did the hawser break? When this question is answered, the party responsible for the collision will be revealed.

The hawser furnished by the barge was an ordinary six-inch harbor line. It was nearly new, having been used but once before. A section of it was produced upon the hearing, and, although examined by hostile witnesses, no fault in it has been pointed out. Being strong enough to withstand any ordinary strain, it must have parted because subjected to an extraordinary strain. The master of the Alpha frankly admits that the hawser broke because he pulled too hard upon it. When within a few hundred feet of the slip, the tug, in her efforts to bring the barge safely around the curve, put her helm hard a-port, thus heading for the south side of the river. In this position the barge passed the tug, and, in seaman's parlance, "tripped her up." They were proceeding against the current at the rate of about four miles an hour, their courses forming an angle of about 45 deg. A tremendous leverage was thus brought upon the hawser, which rolled the tug up almost upon her beam's end. No ordinary line could resist such a strain. It broke about a minute after the helm was put hard a-port. There can be no doubt that it was bad seamanship for the Alpha, with so short a line, and so heavy and unwieldy a tow, to permit herself to get into such a dilemma. This was negligence, and to it the collision is alone attributable. It follows that the libelant is entitled to a decree against the Alpha, with costs, and a reference to compute the amount due. As to the Oneida and the Manitowoc the libel is dismissed, without costs, but the Oneida is entitled to recover her disbursements of the libelant.

THE EL DORADO.¹

CAHILL v. THE EL DORADO.

(District Court, S. D. New York. May 27, 1886.)

COLLISION—CANAL-BOAT AND STEAMER'S PROPELLER—SUCTION—EVIDENCE—PROPELLER AT REST—LIABILITY.

While the libellant's canal-boat H. was being warped by her captain into a slip on the North river, her bow came in contact with the propeller of the steam-ship El Dorado, which was lying at the pier. For the resulting damage the El Dorado was libeled. *Held*, on the evidence, that the steamer's propeller was not in motion at the time of collision, and the steam-ship consequently was not liable.

In Admiralty.

E. D. McCarthy, for libellant.

Charles H. Tweed and R. D. Benedict, for claimants.

BROWN, J. On the twenty-sixth of September, 1885, just prior to the departure of the steam-ship El Dorado from the slip between piers 36 and 37, North river, the libellant's canal-boat Humphreys was injured by her bow's coming in contact with the blade of the steamer's propeller. The canal-boat had been brought into the slip a short time before by a tug, and cast off near the side of the steamer. The slip was nearly full of boats. The captain of the canal-boat, after she was cast off, pulled up along-side the steamer to another canal-boat further up the slip, and outside of a barge that was next to the wharf. While pulling on this line, the bow of his boat came in contact with the propeller. The libellant's witnesses testify that the propeller was in motion; that they saw the commotion of the water made by it; and the libellant's theory is that it was the suction caused by the propeller's motion that drew the bow of the canal-boat against the propeller blade. The testimony on the part of the steamer leaves little doubt that this took place somewhere from 4:15 to 4:30 P. M. Her testimony is also to the effect that the steamer's machinery and her propeller were worked, as usual, from an hour to an hour and a half, up to 2:30 o'clock; that at that time the engine was stopped, the machinery made fast and not moved, nor the propeller blade turned from that time until after the accident, and after the canal-boat had sunk; nor until the steamer had been warped out some 50 feet clear of the canal-boat. The accident is attributed to the forward motion of the boat as she was pulled along, combined with the set of the tide in the slip southward beneath the wharf.

I am satisfied that injuries like the present might be produced by either of the causes mentioned. According to the almanac, it was high water on that day at 9:35 A. M. It would be low water at about

¹Reported by Edward G. Benedict, Esq., of the New York bar.

3:45. In this case, however, it was proved that for upwards of an hour after the water is rising on the flood-tide there is a downward surface current along the docks, and a similar current within the slips, which has more or less free play through the pile-work upon which this wharf was built. Similar evidence has been given before me in other cases, and there is no doubt of its correctness.

The boat was loaded with 275 tons of coal. The canal-boat being of much less draught than the steamer, the effect of such a southward current in the slip, along the after-part of the steamer, would be to draw along the steamer's side until it reached the stern, and there sweep round her stern to pass under the wharf. The position of the canal-boat's stern, angling out into the slip at the time her bow struck the propeller blade, agrees with this theory.

The evidence further establishes, to my entire satisfaction, that the marks of the blow seen upon the canal-boat could not have been made by the propeller blade when in motion. There was no cut answering to any possible motion of any part of the propeller blade, such as existed in the case of *The City of Puebla*, Mar. Reg. April 14, 1886. The print of these marks, taken directly from the boat, and used as an exhibit, together with the place of the blow on the side of the boat only, prove it to be impossible that the blow could have been received in any other way than from the side edge of one of the propeller blades while at rest. The libellant's case is therefore reduced to one of two alternatives: Either that the boat was drawn to the propeller blade through the propeller's previous motion, and that the propeller's motion was stopped within an interval of a quarter of a revolution, just as the bow was going in between the two adjoining blades; or else that, while the propeller was still in motion, the bow went in between the two propeller blades, and stopped the propeller's motion without receiving any deeper injury than the blow shows.

Considering the force of the propeller blade, and its sharp edge, and that there was planking of only two and one-half inches thickness to resist it, and that the boat was loaded with 275 tons of coal, with the momentum of that weight, the second alternative does not seem to me credible. The force of the propeller wheel worked by the engine of so large a steamer would not in any probability have been overcome by such an obstacle without showing any more perpendicular breadth in the mark of the injury, nor without breaking through the boat's ceiling.

The first alternative is also so improbable that it could not be admitted except upon a clear and strong preponderance of proof. There is certainly no such preponderance in this case. The evidence that the steamer's engine was not moved at all from 2:30 until after she was warped out is substantiated by a number of witnesses, and by all the proof that it was possible for the steamer to give. This testimony is entitled to at least equal credit with the libellant's testi-

mony. There is no improbability in the steamer's narrative; and the testimony of her witnesses is not weakened by such a number of minor doubts or inconsistencies as attach to the testimony of the witnesses for the libellant. As the propeller was in motion both before and after the collision, the recollection of the witnesses as to the time of seeing the water in commotion might be easily mistaken. Not considering, and possibly not knowing, of the set of the current beneath the wharf, it was natural to ascribe the swinging of the bows around the stern to the supposed suction of the propeller; and the eddies which would naturally form from such a current around the stern and the rudder of a deep vessel might also be mistaken, in the absence of special attention, for a disturbance of the water supposed to be made by the propeller.

On the whole, there is clearly no such preponderance of proof on the part of the libellant as establishes fault in the claimant's vessel, and I am constrained, therefore, to dismiss the libel.

THE SAMUEL E. SPRING.¹

(District Court, D. Massachusetts. June 8, 1886.)

1. SEAMEN—WAGES—ADVANCE WAGES—ACT TWENTY-SIXTH JUNE, 1884, (23 ST. 53)—DINGLEY ACT CONSTRUED—PROVINCE OF COURT IN CONSTRUCTION OF STATUTES.

The crew of the bark S., on shipment, signed articles made out in the usual way, and containing, *inter alia*, the rate of wages, but without any provision for the payment of any portion of the same in advance. Contemporaneously therewith they made a parol agreement with the shipping master, both as to the rate of wages and the payment of an advance. The difference between the rate of wages named in the shipping articles and that verbally agreed upon was the precise amount of the advance wages. Both agreements were made with the consent of the owners of the vessel, and were fully understood by the crew, and the amounts agreed to be advanced were paid to them upon shipment. At the termination of the voyage the crew were tendered payment of their wages as due by the shipping articles without any deduction on account of payments made in advance. All of the crew, with the exception of the second mate, accepted this offer, and signed a release of all claims against vessel, master, and owners. They, together with the second mate, shortly afterwards filed a libel for the recovery of the amount of wages stipulated for by the verbal agreement, without any deduction for the amounts paid to them in advance. *Held*, that the act of twenty-sixth June, 1884, (23 St. 53,) declares in express terms that the payment of advance wages shall, in no case, absolve the owner, master, or vessel from full payment of wages, or be a defense to a suit for their recovery after they are earned; that it would be an absurd, as well as a palpable disregard of legislative intent, to hold that the law can be evaded by merely having seamen sign fictitious shipping articles, which do not express the rate of wages actually agreed upon and intended to be paid. The second mate is entitled to recover the full amount of his wages as verbally agreed upon, without any deduction for the advance paid to him at the time of shipment. As to the rest of the crew, the

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

libel must be dismissed, there being nothing in the nature of the claim to render it incapable of being released, and it appearing evident that the parties when they signed the release intended to be bound by it.

2. STATUTES—CONSTRUCTION—DOUBTFUL WORDS.

The rule undoubtedly is that statutes are to receive a reasonable construction, and doubtful words and phrases are to be so construed, if possible, as not to produce mischievous results. But when the words used are plain and unambiguous, there is no room for construction,—nothing is left for the court but to give them their full effect.

In Admiralty.

T. J. Morrison, for libelants.

J. M. Browne, for claimants.

NELSON, J. The questions in this case arise under section 10 of the act of June 26, 1884, (23 St. 53,) known as the "Dingley Act," which enacts "that it shall be, and is hereby, made unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged, in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. * * * The payment of such advance wages * * * shall in no case, except as hereinafter provided, absolve the vessel, or the master or owner thereof, from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages." The section contains other provisions allowing allotments of wages to the wife, mother, or other relative of a seaman; excepting whaling voyages from its operation, but including foreign vessels; and making the paying of advance wages, or the falsely claiming relationship to a seaman in order to obtain allotted wages, a misdemeanor punishable by fine and imprisonment.

The case is a libel by the second mate, two able seamen, and two ordinary seamen of the bark Samuel E. Spring, for wages earned on a two-months voyage from New York to Havana and Matanzas, and thence to Boston. The libelants were shipped at New York through a shipping master employed by the owners of the bark, in March, 1886, and signed shipping articles, which were produced at the hearing, by which it appeared that the second mate was to receive for the voyage as wages \$12 per month, the two able seamen \$10 per month each, and the two ordinary seamen \$8 per month each. The libelants gave evidence that at the time of their shipment a verbal agreement, differing from that expressed in the shipping articles, was made by them with the shipping agent, by which the monthly rate of wages of the second mate was to be \$25, of the able seamen \$20, and of the ordinary seamen \$16, and each man was to receive one month's pay in advance; and that one month's wages was paid to each man before sailing. On the discharge of the crew in Boston the four seamen were paid their wages as due by the shipping articles, without deduction on account of the payments made in New York, and signed receipts discharging the vessel, owners, and master from all claims on ac-

count of the voyage. The second mate was offered his wages computed in the same way, but he refused to accept them and demanded the amount due by the verbal contract, without deducting the sum paid him in New York. As the amounts paid to the seamen, and offered to the mate, with the payments in New York added, are exactly the same as the wages would come to if computed according to the verbal contract, the suit, in effect, is to recover over again the wages paid in New York.

That the method resorted to in shipping the libelants was for the purpose of avoiding the stringent provisions of the act of 1884, prohibiting the payment of advance wages to seamen, is apparent from the evidence, and is not seriously denied. The men were to receive, partly in advance and partly at the end of the voyage, the wages verbally agreed upon, and shipping articles were signed making no provision for advances, but showing a rate of wages which, with the sums advanced, gave the men what they were entitled to have by the oral agreement. There can be no doubt that this was done with the authority of the owners, and that the arrangement was perfectly understood and assented to by the men.

The owners complain that if a literal compliance with the act is to be exacted, it will be practically impossible to ship crews in our ports; and they ask the court, both in the interest of ship-owners and seamen, to give the act some sort of a construction that will permit expedients of this kind to stand, and thus prevent the disastrous consequences which would otherwise follow. They especially ask for a ruling that in suits of this nature the shipping articles shall be held to be conclusive as between the parties as to the stipulated wages, and cannot be varied by parol evidence.

The rule undoubtedly is that statutes are to receive a reasonable construction, and doubtful words and phrases are to be construed, if possible, so as not to produce mischievous results. But when the words used are plain and unambiguous, there is no room for construction, and nothing is left for the court but to give to them their full effect. The act prohibits, in direct and positive terms, the payment of advance wages to seamen before leaving port, and declares that such payment shall in no case absolve the owner, master, or vessel from full payment of wages, or be a defense to a suit for their recovery, after they are earned. It applies, in terms, to all voyages except whaling voyages. Its prohibition must clearly extend to indirect as well as direct payments. The illegality of the payment was wholly on the side of the owner. It would be absurd, as well as a palpable disregard of the legislative intent, to hold that the law can be evaded by merely having the seamen sign fictitious shipping articles, which do not express the rate of wages actually agreed upon and intended to be paid for the voyage. I am therefore obliged to hold that the second mate can recover his wages according to the verbal contract, without deducting the payment in New York.

But not so as to the other libelants. I see no reason why they should not be bound by their release. The arrangement by which they received advance wages was entered into solely for their benefit. No fraud or imposition has been practiced upon them. They understood what they were about when they were shipped and when they were discharged. They intended by their release to discharge the debt which they are now suing for. They have received all they bargained for, and there is nothing in the nature of the claim that makes it incapable of being released.

A decree is to be entered in favor of John O'Neil, the second mate, for \$48.22, and costs. As to all the other libelants the libel is to be dismissed. Ordered accordingly.

THE INDUSTRY.

HAMMANN v. THE INDUSTRY, etc.

(District Court, S. D. New York. May 4, 1886.)

COLLISION—WHARVES—PROJECTING BOOMS—EAST RIVER—TOO NEAR APPROACH.

Where a sloop, unloading, lay along a bulk-head at the mouth of Bushwick creek, East river, with her bowsprit projecting partly across the mouth of the creek, and her boom swung out into the river, and a tug, in going into the creek when it was nearly dark, ran into the boom, *held*, upon a dispute of the facts, that it was so nearly dark as to make it negligence in the sloop to have her boom projecting in that manner, without any light or other means of warning; and also a lack of proper care in the tug to go so near to the sloop at night; and both were held in fault, and the damages divided.

In Admiralty.

Hyland & Zabriskie, for libellant.

Knox & Woodward, for claimants.

Brown, J. On the first of December, 1884, the libellant's sloop Citizen lay along the bulk-head at the foot of Quay street, Green Point, on the northerly side of Bushwick creek, discharging a cargo of stone. Her bowsprit projected partly across the mouth of the creek, and her boom was swung out over her starboard side, and made fast by a guy. The steam-tug Industry, about dusk, came up from Pier 8, East river, with the flood-tide, to lay up for the night in Bushwick creek. In rounding to, so as to come down against the flood-tide, and to make the pier on the south side of the creek, in order to back into the creek, she ran into the Citizen's boom, and broke it, and inflicted some other damage.

The principal controversy upon the trial has been in regard to the time of day when the accident occurred. The witnesses on the part of the tug insist that it was already quite dark; and that, as there

was no light either upon the sloop or upon the boom, the boom could not be distinguished in time to avoid it. The libellant's witnesses insist that it was not yet dark; that the boom was sufficiently visible; and that the workmen were still employed in discharging stone from the sloop. There is no means of fixing the time of the occurrence with certainty. The fact that there was one sling of stone remaining to be removed seems to be substantiated; but, as the stevedore was working by the hour, it is not certain that he might not be willing to continue until it was nearly dark. The evidence leaves no doubt that the tug's lights were lighted; and that the assistant foreman went to her aid at the dock, because the workmen who would otherwise have tended her had already gone home. Without determining this point precisely, I think both vessels must be held in fault. The boom of the sloop, according to the evidence, must have extended some 15 or 20 feet from the sloop's side. It was unnecessary that it should extend so far, as the claimant's witnesses acknowledge; and it was a dangerous obstruction. From the whole drift of the evidence it is plain that if not quite dark it was quite deep dusk. It was the time when boats were likely to be coming in to lay up for the night, and a place where they were to be expected; and it was negligence in the sloop to leave her boom projecting out in such a way, and beyond what was necessary, without anything to call special attention to it. On the other hand, there was nothing that required the tug to go so near to the sloop in rounding to and making the wharf below. There was abundant room further off and no obstruction. Vessels were accustomed to discharge at the upper wharf; and I must regard it as a lack of reasonable prudence and caution to approach so near when it was too dark to see what might be about them. A state statute forbids one vessel passing another in motion nearer than 20 yards. While this is not applicable as a matter of strict law, it is applicable by analogy, in the sense that vessels under way should keep at a reasonable distance from others, to avoid the contingencies of accident, particularly at night, where there is nothing requiring a close approach; and such is the undoubted maritime obligation. The damages should therefore be divided.

The libellant testifies that he paid \$150 for the repairs. A decree for half this sum may be taken, unless the claimant desires, at his own risk of any additional costs, to take an order of reference to ascertain the amount.

THEURKAUF v. IRELAND.

(Circuit Court, D. California. March 22, 1886.)

COURTS — JURISDICTION — STATE AND NATIONAL COURTS — CONSTRUCTION OF STATUTE.

A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States, does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute.

Motion to Remand.

S. F. Geil, K. V. Morehouse, and J. P. Meux, for plaintiff.

N. A. Dorn and Thomas Renison, for defendant.

SAWYER, J. On December 14, 1885, the last day for answering, a demurrer to the complaint was filed; one of the grounds being that the complaint does not state facts sufficient to constitute a cause of action. On December 21st, the demurrer was withdrawn by consent of parties, and defendant allowed 10 days' further time within which to answer to the merits. At the expiration of the 10 days allowed defendant procured another extension of time to answer, which carried it to January 10, 1886. On January 9, 1886, defendant answered, and immediately afterwards, on the same day, filed a petition for removal. Section 73, Code Civil Proc., provides that the superior courts "shall hold regular sessions, commencing on the first Mondays of January, April, July, and October," and it further provides that said courts "shall be *always open*;" "except on legal holidays and non-judicial days." The sessions thus provided have often been held, by this court, to be "terms" in this state, within the meaning of the removal act of 1875. *McNaughton v. Southern Pac. R. Co.*, 10 Sawy. 113; S. C. 19 Fed. Rep. 881. Thus, it will be seen that this case might have been, in fact, tried at the October session or term; and if it was not then tried, it was not the fault of the law, but the fault of the attorneys in dallying along by stipulations for further time. A new term commenced January 4th. The cause was at issue, ready for hearing on the general demurrer, and could then have been heard on December 14th, at the October term; as the court is "*always open*;" and a trial on general demurrer is a trial within the meaning of the act, as held by the supreme court in *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495. But the demurrer was manifestly frivolous, and put in for delay. An answer might then have been filed, and the case would have been at issue on the facts.

The demurrer was withdrawn by consent, and defendant given 10 days' further time to answer. Had the answer, even then, been filed, it would have been at issue on the facts, and could have been tried during that term; but the time was again extended, and by such delays and extensions the case was carried over the term. The October

session was, clearly, the term at which it could be first tried, and the petition was filed too late. *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; S. C. 5 Sup. Ct. Rep. 374; *Alley v. Nott*, 111 U. S. 472; S. C. 4 Sup. Ct. Rep. 495.

The plaintiff alleges that he is seized in fee. This is denied in the answer, and defendant alleges affirmatively that the land in question is public land, subject to pre-emption; and that he, being duly qualified, entered within plaintiff's inclosure, and performed the necessary acts to establish a valid pre-emption claim; that he claims a pre-emption right; and that plaintiff claims no right under the laws of the United States; and, upon this allegation of facts, he alleges his legal conclusion, that the cause arises under the laws of the United States, and that, upon that ground, this court has jurisdiction. But it does not appear that there is any disputed construction of any statute of the United States involved. It does not appear but that both parties agree upon the construction of the pre-emption laws. For all that appears from the facts alleged, the whole controversy may turn on the proof of the facts. There is nothing to show that any disputed question of construction will arise, and this must affirmatively be shown, in order to make it affirmatively appear that the court has jurisdiction. It might as well be claimed that it is a proper case for jurisdiction by alleging that the plaintiff claims title by virtue of a patent issued by the United States, without stating that there is any question arising upon a disputed construction of the patent, or any dispute as to its validity. The authorities are numerous to the effect that the record in this case does not affirmatively disclose a case over which the court has jurisdiction; and that it is insufficient to sustain a removal. *Trafton v. Nougues*, 4 Sawy. 178; *Gold Washing Co. v. Keyes*, 96 U. S. 199; *Hambleton v. Duham*, 10 Sawy. 490; S. C. 22 Fed. Rep. 465.

On both grounds the case must be remanded to the state court, and it is so ordered:

SIoux CITY & D. M. Ry. Co. v. CHICAGO, M. & ST. P. Ry. Co. and others.

(Circuit Court, N. D. Iowa, W. D. May Term, 1886.)

1. REMOVAL OF CAUSE—CITIZENSHIP OF NOMINAL PARTY.

The question of the citizenship of nominal parties, joined as defendants with the real defendants in an action, is not to be considered, as against the jurisdiction of a federal court, after removal from a court of one of the states.

2. SAME—WHO ARE NOMINAL PARTIES.

When the allegations of the bill filed in a cause do not show that a sheriff and other officials named therein as joint defendants had any real joint interest in the subject in controversy, they are to be deemed mere nominal parties.

3. RAILROAD COMPANIES—RIGHT TO EXCLUSIVE USE OF LAND.

One railroad cannot, by purchasing land, and proceeding to lay its track thereon, debar from the same land another company which had previously surveyed and staked out there a branch line of its own.

In Equity. Motion to dissolve injunction.

Joy, Wright & Hudson, for complainant.

R. J. Chase, O. J. Taylor, and J. W. Cary, for defendants.

SHIRAS, J. The bill in this cause was originally filed in the district court of Woodbury county, Iowa, a writ of injunction being allowed, upon the filing of the bill, restraining the defendants from proceeding with the condemnation of the right of way over certain realty in the bill described. The Chicago, Milwaukee & St. Paul Railway Company filed its answer to the bill, and a petition for the removal of the cause into the federal court, accompanied with a proper bond. The state court refusing to grant an order of removal, the petitioner procured a transcript, and filed the same in this court, and thereupon filed a motion to dissolve the writ of injunction, on the ground that the answer fully met and denied all the grounds relied upon in the bill as reasons for enjoining the condemnation proceedings. At the time set for the hearing of this motion the complainant filed objections to the jurisdiction of the court, and it therefore becomes necessary to determine whether the case is one that is removable to this court.

The record shows that the complainant is a corporation organized under the laws of Iowa; that the defendant, the Chicago, Milwaukee & St. Paul Railway Company, is a corporation organized under the laws of the state of Wisconsin, and the other defendants are the sheriff of Woodbury county, and the commissioners by him summoned to appraise the damages to be paid by the Chicago, Milwaukee & St. Paul Company for its right of way over the premises in the bill described, and that these individual defendants are citizens of Iowa. The allegations of complainant's bill show that the subject of controversy is the question of which company has the right to occupy the premises in question for the construction of its line of railway. In this question the sheriff and the commissioners have no personal interest. They stand wholly indifferent between the parties. No action by them in the cause can affect the rights of the railway companies. They are purely nominal parties, and their joinder cannot affect the question of jurisdiction and the right of removal. There is but one controversy in the cause, and that is, which company has the prior, and therefore better, right to the occupancy of the premises in dispute, for the purposes of constructing and operating its line of railway? The sole parties in interest in this controversy are the railway companies, and the other defendants having no interest therein, and no right of control over the litigation intended to settle this question, it must be held that these parties

are nominal only, and their presence as parties can neither confer nor defeat jurisdiction in this court.

Thus, in *Wood v. Davis*, 18 How. 467, it is said:

"It has been repeatedly decided by this court that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it."

See, also, *Browne v. Strobe*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat. 421; *Township of Aroma v. Auditor*, 9 Biss. 289; S. C. 2 Fed. Rep. 33; *Foss v. First Nat. Bank*, 1 McCrary, 474; S. C. 3 Fed. Rep. 185.

The allegations of the bill filed in this cause do not show that the sheriff and commissioners have any joint interest in the subject of the controversy with the Chicago, Milwaukee & St. Paul Railway Company; but, on the contrary, it appears from the bill that the only connection they have with the matter in dispute is in discharge of the duty imposed upon them by law, and that does not confer upon them any interest in the controversy; and hence it must be held that they are nominal parties only, and the jurisdiction of this court depends upon the citizenship of the real parties to the controversy, to-wit, the railway companies. As to these the bill, as well as the petition for removal, shows that they are corporations organized under the laws of different states, to-wit, Iowa and Wisconsin; and consequently the right of removal existed, and the filing of the petition and bond in the state court terminated the jurisdiction of that court.

2. The question presented by the motion to dissolve the preliminary injunction is one of importance, and it is with extreme reluctance that I consider it upon a motion to dissolve. The bill avers that the complainant is a corporation, and has been such for nearly a year past, created for the purpose of building a railway from Sioux City to Des Moines, the construction of which has been commenced; that the Chicago, Milwaukee & St. Paul Railway Company is a corporation created under the laws of the state of Wisconsin, is operating a line of railway in Iowa, and desires to condemn the right of way over the premises in the bill described for the purpose of constructing a line of railway from Sioux City to Defiance, in the state of Iowa; that, upon the request of said defendant company, the sheriff of Woodbury county, on the nineteenth day of April, 1886, appointed commissioners to assess the damages to certain lands by reason of the alleged location of said defendant's line of railway over the same; that the said complainant, in the month of October, 1885, located its line of road, and surveyed the same, over the lands in the bill described, for the purpose and with the intent to construct its line over the same, and has commenced the construction of its line over a part of said lands, with the purpose of pushing the construction thereof as speedily as possible; that, previous to the time of the appointment of said commissioners by the sheriff for the ap-

praisal of damages, the complainant had purchased from the owners of the realty, for its right of way over and across the same, certain tracts of land, fully described in the bill; that the complainant procured its right of way over said lands, for the public purpose of constructing its line of railway, before the defendant company acquired any right therein, or any right to condemn said premises for its right of way; that the strips of land in the bill described are necessary for the construction of complainant's road, and were purchased in good faith, for that sole use and purpose; that when it became evident that the complainant was about to build its line of road, and had commenced the same, the defendant company petitioned the sheriff of the county for the appointment of commissioners to appraise the damages for such right of way over said lands on behalf of defendant; that, unless restrained, the commissioners will appraise the damages, thereby condemning the land for the use of defendant; and an injunction is prayed restraining the defendant company, the sheriff, and the commissioners from proceeding with such condemnation. Before filing this bill, as already stated, a preliminary writ of injunction was obtained from the district court of Woodbury county, without notice to the defendant company.

The Chicago, Milwaukee & St. Paul Railway Company, in its answer to said bill, avers that for several years past the defendant company has had in contemplation the construction of a line of railway from Sioux City to Defiance, thus connecting its system of railway in Dakota with its through line from Council Bluffs to Chicago; that, in pursuance of such plan, in the summer of 1881 it caused surveys to be made for such line, and in the fall of 1881 it located the same; that in the year 1883 it procured, by ordinance duly passed, the right to lay a double track along Second street, in said Sioux City, to the eastern limits of the city, and did, during that year, construct its track easterly along said street, to within a few feet of the eastern corporate limits of said city, the same being done as the commencement of its said line to Defiance; that in October, 1884, it purchased 15 lots in Felt's addition to Sioux City, lying next east of the city limits, in direct line with the location of defendant's road, and did also purchase of said Felt a piece of land contiguous to and bounded by said lots, and extending to the middle of the Floyd river, the same being purchased so as to secure the right of way for the construction of said line to Defiance; that in June, 1885, it retraced its located line, and permanently located the same between Sioux City and Defiance, the same being marked with stakes driven in the center of the line, at a distance of 100 feet, and that defendant's line over all the premises in the bill described was permanently located in June, 1885; that, having decided to immediately construct said Defiance line, it did, on the morning of the fifteenth day of April, 1886, commence to negotiate and contract for the right of way along said line, obtaining by purchase such right of way over certain premises set

forth in the answer; admits that on the nineteenth of April, 1886, at its request, commissioners for the appraisal of damages were appointed; and further avers that complainant well knew that defendant was intending to construct its located line from Sioux City to Defiance, and had commenced procuring the right of way, and that, in fraud of the rights of defendant, and in some cases by misrepresentations, complainant procured conveyances of the premises and right of way in the bill described, but that the same were not procured until after the defendant company had initiated proceedings in condemnation.

The admitted fact is that both complainant and defendant are engaged in building lines of railway south-easterly from Sioux City, and, owing to the character of the country, the opportunities of getting feasible routes are limited, and both companies are anxious to secure the line over the premises in the bill described. The question presented is whether complainant is entitled to continue in force the writ of injunction which forbids the defendant from having the damages assessed for its right of way. This really involves the point whether it appears from the allegations of the bill and answer that complainant has the better right to the occupancy of the premises in dispute. On part of complainant, it is argued that the conveyances to it give it the absolute title to the right of way, because, when they were executed, the defendant company had not paid the damages to the owners of the land; that payment is necessary, under the statutes of Iowa, to create a right in the railway company as against the owner of the land; and that until payment is made the owner's control over his property is absolute, and he can convey the same, or a right of way over the same, to any railway company. On part of defendant it is claimed that the permanent location of a line of railway by survey and marking upon the ground must be deemed to be the beginning of the building of the road; and that the right thus acquired will not be lost, provided the construction of the road is resumed within five years, that being the limitation fixed by section 1260 of the Code of Iowa.

That the survey and location of a railway is part of the work of constructing the same, is held in *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa, 476-482; S. C. 1 N. W. Rep. 712.

It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the state, and although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right

to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner cannot, by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the state has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right.

Section 1241 of the Code of Iowa provides that any railway company make take and hold "so much real estate as may be necessary for the *location, construction, and convenient use of its railway,*" etc.; and section 1244 enacts that, where the parties cannot agree upon the compensation to be paid, the sheriff of the county shall, upon application of either party, appoint six disinterested freeholders, who shall assess the damages; and by section 1245 it is provided that the application to the sheriff shall be in writing, and the freeholders appointed shall assess all damages to realty in the county, five days' notice being given to the party in interest. Section 1253 provides that the report of the commissioners, with the amount of damages, may be recorded in the record of deeds; "and such record shall be presumptive evidence of title in the corporation to the property so taken, and shall constitute constructive notice of the rights of such corporation therein." This recording, however, cannot be made until the commissioners have filed their report. From the time the application is made to the sheriff for the appointment of commissioners, and while they are engaged in the performance of their duty, it must be certainly true that the company seeking the condemnation of the land has a right which cannot be defeated by the action of the property owner in conveying a right of way to a rival company. Whether such right may not, at least in some cases, antedate the time of the application to the sheriff, is open to question.

In *Morris & E. R. Co. v. Blair*, 9 N. J. Eq. 635, it was held that, under the Statutes of New Jersey, the prior right belonged to the corporation which first actually surveyed and adopted a route, and filed its survey with the secretary of state.

In *Titusville & P. C. R. Co. v. Warren & V. R. Co.*, 12 Phila. 642, it was held "that, when a railroad company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners, and occupy the land." The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the

same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the sheriff for the appointment of commissioners. *Mills, Em. Dom.* § 47; 1 *Redf. Rys.* § 15; *Pierce, Rys.* 257. As to the effect given to a location of a route under certain acts of congress, see *Railway Co. v. Alling*, 99 U. S. 463; *Ex parte Railway Co.*, 101 U. S. 711.

By the averments in the answer filed in this cause, it is made to appear that the line of the defendant's road through Woodbury county was finally and permanently located in June, 1885, and it was so done and marked that the complainant must have known the exact location of such line. On the sixteenth day of April, 1886, the defendant company procured the transfer of the right of way over a small part of the line, and on the nineteenth of April procured the appointment of commissioners to appraise the damages on the entire line in Woodbury county. On the nineteenth and twentieth days of April, 1886, the complainant received the conveyances of title to part, and of the right of way over the remainder, of the premises in dispute. Part of these conveyances do not define a special line, but grant a right of way over a specific tract of land, leaving it to be determined in the future where the right of way shall be located. Under the allegations of the bill and answer it is not made to appear that the complainant company had the prior right over these premises, but, on the contrary, it appears that when complainant procured the same it well knew that the defendant company had located its line of road over the same, and was procuring by purchase and condemnation the right of way, and was proceeding in the construction of the road. Consequently the conveyances to the complainant must be held to have been taken subject to the prior right of the defendant company.

On the seventeenth of August, 1885, G. R. Camp and wife conveyed, by warranty deed, the fee title to eighty-eight one-hundredths acres, in section 35, and it is now claimed by complainant that, being the owner of this land, it has the right to locate its track thereon, to the exclusion of the defendant. When this purchase was made the line of the defendant company was permanently located and marked upon this tract, and the mere fact that the complainant bought the land does not, of itself, defeat the right of the defendant to construct its road over the same. The right of eminent domain in the state extends to lands owned by railway companies as well as to those owned by individuals.

The question is whether the complainant, as the owner of the land, has the right to prevent the defendant company from constructing its road over the line permanently located in June, 1885. If it be true

that complainant, by making the purchase of the realty over which the defendant's line is located, has the right to prevent the completion of the road, then it would be in the power of any company to prevent the construction of competing lines by simply purchasing portions of the realty over which the line is located and placing thereon its own track. From the allegations of the bill and answer, it is clear that the defendant company located its line through Woodbury county, and over the premises in the bill described, before the complainant had secured any right of way, or had in any way located its line. There is no fact shown which would justify the court in holding that the defendant had abandoned this location, or the rights thereby conferred. On the contrary, the averments of the answer, which are not controverted, show that the defendant is proceeding with the construction of its located line, and that, when complainant procured the conveyances on which it relies, it knew of the location of defendant's line, and that the final construction thereof was being proceeded with.

If the injunction heretofore granted should be continued in force, it would prevent the defendant from constructing a bridge over the Floyd river at the place selected therefor, and would compel other serious and injurious changes in the located line. To justify such action, the right of complainant, and the need therefor, must be made clear. Under the showing made by the bill and answer the prior right seems to be with defendant, and, under such circumstances, it cannot be expected that the court will, by injunction, prevent the company from proceeding with the condemnation of the premises, and the construction of its road. It is to the public interest that the construction of both lines should be assured. While each company is entitled to proper protection in its rights, still neither company should be permitted to interfere unnecessarily with the construction of the other line. The prior location made by the defendant company, in connection with the work and outlay incurred in beginning the actual construction of the line, gives it the prior right to the use of so much of the right of way as may be necessary to enable it to construct its road over the selected line, but it does not follow that every other company is to be debarred from using a portion of the general right of way, if the use thereof is essential to the building of the competing line. Cases may arise which would justify equitable interference in the interests of the public, if it should appear that one company was seeking to defeat the construction of another line by excluding it from using premises not essential to the former. Priority of right does not necessarily mean the right to wholly exclude other companies from the use of a part of the 100 feet, if such use is necessary to insure the building of the other line.

As the facts are now made to appear from the bill and answer, the priority of right is with the defendant company, and the injunction heretofore granted must therefore be dissolved; and it is so ordered.

WHITEHEAD, Trustee, v. ENTWHISTLE.

(Circuit Court, N. D. Iowa, C. D. June Term, 1886.)

1. EQUITY—JURISDICTION—REMEDY AT LAW.

To sustain the jurisdiction in equity, it must be shown that there is no sufficient and speedy remedy at law.

2. COURTS—UNITED STATES COURTS—STATE STATUTE CREATING NEW RIGHT—JURISDICTION.

Where a state statute creates a new right, and provides a remedy for the enforcement thereof, the United States courts will, for the protection of the right created, follow the remedy prescribed; but this is subject to the limitation that the remedy is not contrary to some provision of the constitution of the United States or acts of congress.

3. SAME—NEW EQUITABLE REMEDY—ADEQUATE LEGAL REMEDY—RIGHT OF TRIAL BY JURY.

In the United States courts, if the remedy at law is speedy and adequate, a remedy in equity, created by state statute, cannot be resorted to, because of the provisions of section 723 of the Revised Statutes, and of article 7 of the amendments to the constitution of the United States, guarantying the right of trial by jury.

Equity. Demurrer to bill.

John F. Duncombe, for complainant.

C. A. Clark, for defendant.

SHIRAS, J. By the bill filed in this cause, the complainant seeks to quiet the title to certain real estate situated in Humboldt county, Iowa, averring that he is the owner in fee-simple thereof, holding the legal title as trustee for the Des Moines & Fort Dodge Railroad Company; and further alleging that the defendant is in actual possession of the premises in question, claiming title thereto under a homestead entry made in the year 1867, and under a purchase from the Iowa Homestead Company, which latter company claims under the act of congress passed in 1855, granting lands to the state of Iowa in aid of the construction of certain lines of railway in said state. The bill charges that the claim and pretended title of defendant is without foundation, in law or equity; that the certificate of entry under the homestead act, and the conveyance from the Iowa Homestead Company, are fraudulent and void, procured without legal right, and in violation of law; but that the same are clouds upon complainant's title. Wherefore complainant prays that the certificate of entry under the homestead act, and the conveyance to defendant from the Iowa Homestead Company, be annulled and canceled, and the cloud upon complainant's title be removed, and that the title be quieted in complainant.

To this bill defendant demurs, upon the ground that this court as a court of equity has not jurisdiction, in that it appears that complainant has a plain, speedy, and adequate remedy at law.

From the averments of the bill it appears that complainant is not seeking equitable aid to perfect his own title or the evidences thereof. He avers that, as trustee, he holds the legal title to the

land, and exhibits the chain of conveyance upon which he relies. The relief asked in the bill is wholly aimed at the clouds caused by the evidences of title under which defendant claims, and as to these it is averred that they have no foundation in law or equity. It is also averred that defendant is in actual possession of the land, holding the same openly and adversely to the claim of complainant.

Section 723 of the Revised Statutes provides that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law." As is said by the supreme court in *Lewis v. Cocks*, 23 Wall. 466, this provision of the statute is only declaratory of a principle which is as old as the earliest period of the recorded history of English equity jurisprudence. By express declaration of the constitution of the United States it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." If, then, a plain and adequate remedy exists at law, a defendant cannot be called upon to submit his rights to the decision of a court of equity, because he has a constitutional right to a trial by jury. *Hipp v. Babin*, 19 How. 271; *Lewis v. Cocks*, 23 Wall. 466; *Killian v. Ebbingshaus*, 110 U. S. 568; S. C. 4 Sup. Ct. Rep. 232; *Fussell v. Gregg*, 113 U. S. 550; S. C. 5 Sup. Ct. Rep. 631.

To sustain the jurisdiction in equity, it must be shown that there is no sufficient and speedy remedy at law. The bill in this cause not only fails in this particular, but, on the contrary, affirmatively shows that a plain and proper remedy can be had at law. It is averred that complainant holds the legal title to the lands, and that the defendant is in possession thereof, denying complainant's right. The bill, by its averments, shows clearly that complainant and defendant claim title from different sources, and through different chains of conveyances, and the real question to be determined is, which is the better legal title? The defendant being in possession, an action at law in the nature of ejectment affords a plain and speedy mode of settling the question of title, and that fact is fatal to the jurisdiction in equity.

On part of complainant it is urged, however, that the statute of Iowa confers the right to bring a bill to quiet title in cases of this character, and that thereby the jurisdiction of this court in equity has been enlarged. Section 3273 of the Code of Iowa enacts that "an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession." As construed by the supreme court of Iowa, it cannot be questioned that this section enlarges the powers of a court of equity, and that, in the state court, a bill in equity may be entertained in favor of a party in possession against one not in possession, and in favor of one not in possession against

one in possession. *Lewis v. Soule*, 52 Iowa, 11; S. C. 2 N. W. Rep. 400; *Lees v. Wetmore*, 58 Iowa, 170; S. C. 12 N. W. Rep. 238.

On the part of complainant it is argued that under the rule announced in *Clark v. Smith*, 13 Pet. 196; *In re Broderick's Will*, 21 Wall. 503; and *Reynolds v. National Bank*, 112 U. S. 405; S. C. 5 Sup. Ct. Rep. 213,—to the effect that “the state legislatures certainly have no authority to prescribe the forms and proceedings in the courts of the United States, but, having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court. On the contrary, propriety and convenience suggest that the practice should not materially differ where titles to lands are the subjects of investigation,”—the section of the Code of Iowa above cited creates a new right, enforceable in equity, and therefore this court has the right to entertain the present bill.

There can be no doubt, under the repeated decisions of the United States supreme court, that where a state statute creates a new right, and provides a remedy for the enforcement thereof, the United States courts will, for the protection of the right created, follow the remedy prescribed; but this is subject to the limitation that the remedy is not contrary to some provision of the constitution of the United States or of the acts of congress. Under the Code of Iowa, a party not in possession of realty may bring an action against another, also out of possession. This is a statutory enlargement of rights, and as no action at law will lie in such case, this court, as a court of equity, would have jurisdiction thereof. If, under the Code of Iowa, a party having the legal title to realty, and being out of possession, may bring, as against a party in possession, either a suit in equity to quiet title and for possession, or an action at law, then, suing in the state courts, he has a choice of remedies. In the United States courts, if the remedy at law is speedy and adequate, he cannot avail himself of the remedy in equity created by the state statute, because of the provisions of section 723 of the Revised Statutes, and of article 7 of the amendments to the constitution, guarantying the right of trial by jury.

Counsel for complainant quote largely from the opinion of the supreme court in *Holland v. Challen*, 110 U. S. 15, S. C. 3 Sup. Ct. Rep. 495, a case arising in Nebraska, under the provisions of a state law identical in meaning with that of Iowa, and in which case the jurisdiction in equity was sustained. In the circuit court the bill was dismissed on demurrer, which ruling was reversed by the supreme court. The bill did not aver that complainant was in possession, but did aver that the defendant was slandering complainant's title by claiming to be the owner of the real estate, and by trying to obtain, take, and keep possession thereof. In the opinion of the court, the benefits

of the state statute are pointed out, and it is clearly demonstrated that no fact appeared upon the face of the bill which defeated the right of the court to entertain jurisdiction in equity. It is made plain, however, that this ruling was based upon the assumption that the defendant was not in possession, and that therefore an action at law could not be sustained. Thus, we find it said:

"No adequate relief to the owners of real property against the adverse claims of persons not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to possession,—the actual owner of the fee,—is helpless in the matter, unless he can resort to a court of equity. It does not follow that by allowing, in the federal courts, a suit for relief, under the statutes of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to, or right of possession of, real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, *nor is it of such cases we are speaking*. * * * If the controversy be one in which a court of equity *only* can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

In *Reynolds v. National Bank*, 112 U. S. 405, S. C. 5 Sup. Ct. Rep. 213, it is held that the legislation of the state may be looked to, to ascertain what constitutes a cloud upon a title, and that what is declared to be a cloud by state statute will be removed by a court of the United States sitting in equity, even though, in the absence of the statute, the defect was not such as courts of equity had recognized as casting a cloud upon the title. The facts of the case did not present the question of a speedy and adequate legal remedy.

Killian v. Ebbinghaus, 110 U. S. 568, S. C. 4 Sup. Ct. Rep. 232, and *Fussell v. Gregg*, 113 U. S. 550, S. C. 5 Sup. Ct. Rep. 631, reiterate the rule to be "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

If, then, it be true that the state statute can, by enlarging equitable rights and remedies, confer upon the United States courts equitable jurisdiction in a case wherein there exists a plain and adequate remedy at law, it follows that indirectly, but effectually, state legislation has abrogated section 723 of the Revised Statutes, which expressly forbids the United States courts from taking jurisdiction in equity in cases wherein the remedy at law is adequate, and has annulled the constitutional provision securing the right of trial by jury.

As we construe the allegations of the bill filed in the present cause, it clearly appears therefrom that complainant has a speedy and adequate remedy at law to settle the question of title and right of pos-

session of the realty in dispute between the parties hereto; and, that being so, it follows that this court cannot, sitting as a court of equity, entertain jurisdiction of the cause, and the demurrer to the bill must therefore be sustained.

BREWER, J., concurs.

DOSTER v. SCULLY.

(Circuit Court, D. Kansas. June 8, 1886.)

1. ATTORNEY AND COUNSEL—ADVICE—ESTOPPEL.

While a lawyer does not insure the correctness of his advice, yet, after having given it, he is estopped from speculating upon it to the injury of his client.

2. SAME—INCORRECT ADVICE, IN GOOD FAITH—EFFECT OF ATTORNEY'S SUBSEQUENT PROFIT BY IT—ESSENTIAL CONDITIONS.

When a lawyer ignorantly and mistakenly, yet honestly, gives advice, and thereafter enters upon a speculation in respect to the property, the subject-matter of the advice, the law holds him as an agent for his client, and holds the speculation as only for the benefit of the client. But if, when giving the advice, the lawyer at that time understood, not that he was regularly employed to do so, and if the advice was an answer abstractly correct to a question put generally, and not with all the facts and circumstances of the case stated, the above principle does not apply.

In Equity.

J. J. Buck and W. H. Rossington, for complainant.

L. F. Vuller, for defendant.

BREWER, J. The facts in this case are these: A man named Christie was the holder of a large body of land in Marion county, including therein the tract upon which the mortgage in controversy is sought to be foreclosed. On November 29, 1879, he executed a note for \$1,973 to a man named Gregg. Both of these parties lived in Canada. On February 20, 1880, Christie acknowledged and delivered a mortgage on this tract to secure such note. That mortgage was recorded March 8, 1880. It was signed and acknowledged by him on February 20th, though not signed or acknowledged by his wife until February 24th, but in fact it was delivered to the mortgagee on February 20th, or, rather, delivered to his agent, and this agent afterwards went and got the wife's signature. It was delivered in lieu of a mortgage which had been executed in November prior, and returned. So that this Mr. Gregg had a mortgage in his possession, acknowledged by the mortgagor on the twentieth day of February, 1880. On the twenty-third of February, three days after he received the mortgage, an attachment was placed upon this land by a man named Leonard. The mortgage was therefore executed and delivered by the mortgagor himself three days before the attachment, but not recorded until about eight days thereafter. That attachment suit

was prosecuted to judgment, the property sold, and purchased by the defendant. Thereafter Mr. Doster became, by purchase of Mr. Gregg, the owner of that mortgage, and brings this suit to foreclose.

The first question—which is now hardly a question—is whether his mortgage is prior to that attachment. The case of *Holden v. Garrett*, 23 Kan. 98, disposes of that question; and it holds that the mortgage, having been executed and delivered before the levy of the attachment, is the prior lien.

After that attachment had been pushed to judgment, and just prior to the sale, this state of facts arose, and creates the embarrassing question in the case: Mr. Christie was the owner of a large body of land covered by several liens,—different tracts, covered by different liens. Mr. Doster, the plaintiff in this case, was counsel for some of the lienholders, though not counsel for Mr. Christie, nor for Mr. Leonard. In foreclosing these liens, of course he was anxious to find somebody to purchase. Mr. Scully, who is a large landed property owner in Marion county, also owning lands in Illinois, was induced to investigate the subject. One of his agents, Mr. John Scully, came out in May or the forepart of June, and looked the land over. He went back, and reported to his partner in Illinois, and on the twenty-second day of June Mr. Koehnle, accompanied by a Mr. Schwerdtfeger, arrived in Marion Centre, coming to look up these Christie lands, with a view to their purchase. Mr. Koehnle had been in the real-estate business for some years, and was a general agent for Mr. Scully, looking after his property in Illinois and elsewhere. The sale of the bulk of these lands, though not of the tract covered by the attachment, was to take place on the twenty-fourth of June. Mr. Koehnle and Mr. Schwerdtfeger reached Marion Centre on the 22d, in the evening. The 23d they went through the records of the county, examining the title. On the 24th they visited Mr. Doster's office. And Mr. Koehnle testifies that he intending to leave town, and not be present on the fifth of July, when the property in the attachment suit was to be sold, employed Mr. Doster in the matter, first asking him whether the Gregg mortgage was a lien prior to the attachment; that Mr. Doster told him it was not; and that he, relying upon that, left with Mr. Doster instructions to buy the land at the attachment sale, and it was bought.

Now, the defendant relies upon this proposition: That an attorney is bound by the advice which he gives his client, and that, having given advice of a certain character, he cannot thereafter deal with the property, the subject-matter of the advice, to his own personal gain, and the prejudice of the client who has acted upon his advice. His claim is: "Mr. Doster said to me that that mortgage was an inferior lien to the attachment. I relied upon that advice, bought the land, and now Mr. Doster cannot turn round, buy that mortgage for a song, and foreclose it against my land." Well, the proposition of law is beyond any question. There is such an obligation resting upon

a lawyer to his client that, while he does not insure the correctness of his advice, yet, after having given it, he is estopped from speculating upon it to the injury of his client. Of course, the question arises in two forms. It may be a case where the counsel knowingly and intentionally gives false advice with a view of personal speculation thereafter. In such a case as that, the law is emphatic that he takes nothing by his subsequent speculation; that he forfeits the money he has paid; and that all inures to the benefit of the client. The other case is where a lawyer, ignorantly and mistakenly, yet honestly, gives advice, and thereafter enters upon a speculation in respect to the property the subject-matter of the advice; and there the law treats him as an agent of his client, and hold his speculation as only for the benefit of the client. There would not be any dispute, I presume, among members of the bar generally, as to the correctness of these propositions of law, and the necessity of strict adherence to them in all cases. It is the foundation of the confidence which ought to exist between counsel and client, and which can alone enable counsel to act freely and fully for the benefit of the client.

Now, that Mr. Doster did not intentionally misrepresent the law to his client; that he did not misrepresent the matter knowingly, and for the purposes of subsequent speculation,—is perfectly apparent. A multitude of circumstances show that. In the first place, he had no interest in the Gregg mortgage, or in Mr. Christie, the mortgagor. He not only had no knowledge of the mortgagee,—no certainty, or even probability, that he would thereafter acquire an interest in that mortgage, or have anything to do with the mortgagee,—but, on the other hand, he was interested pecuniarily in securing such a client as Mr. Scully, who had large interests in Marion county, and was the prospective buyer of further interests, which, in the very nature of things, would make him desirable as a client. Under those circumstances, it is not to be supposed that any man of ordinary sense would deliberately misrepresent the law to one whom he was seeking as a client, in the possible and purely speculative hope that he might, some time in the future, acquire an interest from a stranger in an outstanding mortgage. Further, if he was intending wrong, how easy it would have been for him to purchase this mortgage from Mr. Gregg through somebody else, have the transactions conducted in the name of a third party, and himself never figure, and so never be known as having any interest in the mortgage; whereas, he directly purchased the mortgage from Mr. Gregg for his wife, and, when this question arose, took it from his wife to himself. So that his conduct, giving him credit for half common sense, is irresistible demonstration to me that there was no thought on his part of any wrong towards his client.

Was there in fact any information given by counsel to client in respect to the matter of law? This is a difficult question. Mr. Koehnle swears that he consulted Mr. Doster on the morning of the twenty-

fourth of June, and asked him whether the Gregg mortgage was prior to the attachment lien, and was told that it was not; and that, relying upon that, he left instructions with Mr. Doster to buy this property on the fifth of July. Mr. Schwerdtfeger testifies that he was in the office with Mr. Koehnle on the morning of the 24th, and that he heard a conversation of similar import. Mr. Koehnle swears that on the morning of the 26th he again visited Mr. Doster, and again had a similar conversation. Mr. Doster swears there was nothing of the kind; that he never gave him any advice of that character,—never gave him any advice at all in respect to the Gregg mortgage, or as to whether it was a lien prior to the attachment.

Well, there are two witnesses against one. The testimony of the witnesses, so far as you can gather it from the reading of these voluminous depositions, is of a kind which commends itself to one's judgment. It does not appear, upon the face of it, as the testimony of men that are intending to deceive the court by statements other than such as are true in their recollections. This makes it embarrassing, and I have striven to see if I could find from the testimony any solution of the manifest conflict between these apparently credible witnesses, and determine what the real truth was.

It appears that Mr. John Scully, the partner of Mr. Koehnle, had visited Marion county in the latter part of May, or early part of June, prior to this. He went there for the purpose of examining the title to these lands. He went to the register of deed's office, and looked up the title, and carried home some *memoranda*. He visited Mr. Doster, not as a client, but was about the office as a stranger naturally might be. Mr. Koehnle came the twenty-second of June. He was a real-estate agent. He was familiar with the examination of titles. Mr. Schwerdtfeger was a young lawyer who came with him from Illinois. They spent the twenty-third of June in the register of deed's office, and in the office of the clerk of the district court, examining these titles, making their own abstracts, or *memoranda*,—forming their own judgment as to the titles; claiming (Mr. Koehnle did) that as to the general run of titles he was competent to determine, but as to matters of local law declaring that he was not familiar, and depending upon counsel here for those matters. "On the morning of the 24th," (and I quote his exact language,) as he says, "I called on Mr. Doster,—on the morning of the sale,—with Mr. Schwerdtfeger, to agree upon the amounts that I was to bid for the land. I told him that the sale of this land would be on the fifth of July, and that I would have to get him to attend to it, and bid in the land for Mr. William Scully, if he was satisfied that the Gregg mortgage, which was filed after the attachment had been levied, would cut no figure in the case, and that Mr. Scully would be safe in buying the land; to which Mr. Doster replied that the attachment levy had priority over the mortgage." Mr. Schwerdtfeger is not very distinct, but he recollects some remarks of that kind. And it appears, further, from Mr. Koehnle's testimony,

as follows: "Did you give the complainant a statement of the facts as to the date, time of filing, and all other necessary information upon which he could base an opinion as to the priority between the Gregg and Leonard lien? *Answer.* I did not, but, from the conversation we had, it seemed that Mr. Doster knew all about the case, having had the conversation with Mr. Scully a few weeks before." Mr. Scully (the gentleman referred to) is dead. His testimony is not to be had.

So that it appears, by Mr. Koehnle's own statement, that he gave Mr. Doster no *data*. He had no abstract. He showed him nothing as to the facts of the case; but, as he thought, Mr. Doster seemed to know all the facts. Mr. Doster testifies that he knew nothing about the case; never examined the records; that he had no conversation with Mr. Scully in reference to that attachment; and that he did not have this kind of a conversation with Mr. Koehnle. He says, in his testimony, which is carefully given, that it is very possible some one, perhaps Mr. Koehnle, may have asked him the question: which had the priority, an attachment levied to-day, or a mortgage filed to-morrow? and he may have answered such a question; and this, taking Mr. Koehnle's own statement of what took place, seems to me to be the correct explanation of the transaction; that Mr. Koehnle going there, knowing that Mr. Doster had several claims upon the Christie land, and was interested in their sale, took it for granted that Mr. Doster knew all about this particular tract, and may have asked him some such general question. Up to that morning it is not claimed that there had been any relation of attorney and client. That was the initial of such relationship.

It is that explanation which gives a fair and reasonable interpretation to the testimony of both Mr. Doster and Mr. Koehnle. It is not pretended but that Mr. Koehnle himself did examine the register of deed's office. He went there for that purpose. He relied upon his own judgment upon the general run of the title. The law in Illinois, under the same circumstances, would have given the attachment priority to the mortgage. Mr. Schwerdtfeger, (a young man who was with him,) an Illinois attorney, advised him, as he says, that the attachment was prior to the mortgage; at least, that that was the Illinois law.

At the same time that Mr. Koehnle made the arrangement with Mr. Doster for buying in the land, Mr. Doster, as he says, told him that, having varied interests to look after in respect to these Christie lands, he wanted all instructions from his various clients put in writing. He asked him to write just what he wanted him to do; and Mr. Koehnle sat down in his office, and, upon one of his letter-head tablets, wrote the instructions in reference to the same. In those instructions that which was sought from Mr. Doster was the regularity of judicial proceedings. Further than that, the case of *Holden v. Garrett* had been decided at the July term of the supreme court,

prior to this time. That fact was known to Mr. Doster. If a full statement of the facts was presented to him, it is not to be presumed that a lawyer of his intelligence and familiarity with decisions of the supreme court would have given advice to the contrary. Further, he had himself, in the Marion county district court, a year or two previous to this time, contested successfully for the same determination. It was a matter, therefore, with which he was familiar; and, unless you impute to him intentional wrong in the matter, it can hardly be supposed possible that, with all the facts presented to him in reference to that title, he could have given the advice which Mr. Koehnle says he did give. Still further, the mortgage was acknowledged by the husband on the twentieth of February, three days before the attachment; by the wife, on the 24th; and it is more than possible that the parties relied upon the date of such acknowledgment as well as upon the recording after the levy.

The whole series of the correspondence between the parties is here. Thereafter Mr. Doster acted for Mr. Scully in various matters, and there are several passages which seem to carry the idea that Mr. Scully was looking to Mr. Doster as his general counsel. It is conceded, however, by Mr. Koehnle, that up to this time there was no relationship of counsel and client; and when he says that he showed him no abstract, and that Mr. Doster seemed to talk as though he knew it all, and Mr. Doster affirms that he knew nothing about the matter, the only reasonable explanation, consistent with good faith and honesty on the part of the various parties, is that some such question as has been suggested was propounded. Mr. Koehnle may have said that the title was all right, except that a mortgage was filed after the levy; perhaps may have said that it was acknowledged after. Under those circumstances Mr. Doster's saying to him that the attachment was prior to the mortgage, only gave information which was correct, upon the facts presented.

One other consideration should be noticed: Before a lawyer is punished by the enforcement of this strict rule, it should be made satisfactorily to appear that he did give information,—that he gave it as counsel, and upon facts presented to him fully and correctly by his client. Any general opinion as to the law, given by counsel upon a half statement of the facts by the client, ought not to prejudice the counsel. It is very evident that these gentlemen went to Marion county, not looking to Mr. Doster to protect their interests in all matters, believing themselves competent as real-estate men, and relying upon their own judgment; that they were in that business; and, before they can hold him to such a rigorous doctrine, it seems to me they should make it clear that they presented to him, as their counsel, the full facts, and got his opinion thereon. This is not proved. At least, it is probable, in my judgment, that nothing of that kind took place; and, as the burden is upon them, their defense must fail.

One other matter: There were tax-sale certificates outstanding, held by Mr. Edward Wilder, of Topeka. Mr. Doster was asked about these sales. He advised that they were illegal, because the taxes were excessive. His advice was correct. After this land was purchased at the sheriff's sale Mr. Koehnle wrote to Mr. Doster to see if he could not buy the tax-sale certificates from Mr. Wilder, and thereafter get a deed; and he did so. I do not see that that prejudices Mr. Doster's right to foreclose this mortgage. The tax deed may be in form, but it is not yet protected by the statute of limitations. While the deed cannot stand as a deed to defeat this foreclosure, yet the tax lien has not been destroyed. The defendant was under no obligations to pay these taxes,—taxes which accrued prior to his purchase at the sheriff's sale. I think that the deed should be set aside, and the taxes adjudged a lien prior to the mortgage. So there will be a decree in favor of the plaintiff for foreclosure of the mortgage, giving a lien subsequent to these taxes.

HARDT v. LIBERTY HILL CONSOLIDATED MIN. & WATER Co. and others.

(Circuit Court, D. California. May 16, 1886.)

1. INJUNCTION—MODIFICATION OF ORDER—SERVICE OF PAPERS.

The rules and practice of the circuit court of the Ninth circuit, on an order to show cause why an injunction should not be modified, require copies of all the moving papers to be served with the order; and mere supporting affidavits cannot be filed in opposition to the affidavits showing cause, where the latter only controvert the moving affidavits, and do not set up any new affirmative matter constituting a defense.

2. MINES AND MINING CLAIMS—MINING DEBRIS—IMPOUNDING DAMS.

No dam for impounding mining *debris*, erected in mountain rivers, should be held sufficient to protect riparian and other proprietors below, where the determination of their sufficiency rests upon the opinions of engineers, apparently equally intelligent, and those opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character.

3. SAME.

It is not the province of the court to speculate upon the sufficiency of means adopted by trespassers for the protection of parties trespassed upon, or the sufficiency of such means to resist the action of the forces of nature, where the *data* for a correct determination are uncertain and unreliable, and where an error in judgment is liable to work great injury to the latter.

In Equity.

A. L. Rhodes and A. L. Hart, for complainant.

James K. Byrne, for respondent.

SAWYER, J. This is a suit similar to the somewhat noted *Mining Debris Case*, 9 Sawy. 441, S. C. 18 Fed. Rep. 753, to enjoin defendants from discharging the *debris* resulting from hydraulic mining into Bear river, by means of which it is carried down and deposited

upon the lands of complainant, who is a riparian proprietor in the Sacramento valley, on the river below. A preliminary injunction having been granted, one of the defendants, the Liberty Hill Consolidated Mining and Water Company constructed a dam across the river in the canon below its mines for the purpose of impounding the *debris* resulting from its mining operations, and preventing it from flowing down the river, and injuring complainant. It now moves for a modification of the injunction on that ground, so as to be permitted to proceed with its mining. The defendant moves upon two affidavits of its engineers, describing the dam and its mode of construction, and declaring their opinion that it is wholly sufficient to permanently impound the *debris* and obviate all injury for the future. Complainant, in opposition, presents affidavits of two other engineers, who give their account of the construction and character of the dam, and express a decided opinion that the dam is wholly insufficient to accomplish the intended purpose. The defendant replies by affidavits of seven other parties sustaining the position of defendant, and contradicting complainant's affidavits in some particulars, to which complainant again responds by several counter-affidavits. The second batch of both respondent's and complainant's affidavits is objected to by the opposing party as not being admissible under the rules and practice of the court. The respondent in the case is the moving party, and the rules and practice in this court require that all the papers and affidavits upon which the motion is based shall be served with the notice of motion or order to show cause, and that supporting affidavits will not afterwards be received, unless, in the discretion of the court, the moving party is permitted to reply, where the other party sets up *new affirmative matter constituting a good answer to the application*. In this case the second batch of affidavits filed in response to complainant's affidavits in answer to the order to show cause all related to the character, structure, and sufficiency of the dam for the purpose intended, and cover the same ground precisely as the moving affidavits, only they go more minutely into the particulars of the facts, in response to the more particular statement of facts given in the complainant's affidavits, and state the then present condition of the dam. We do not think the complainant's affidavits, in response to the order to show cause, presented *any new affirmative matter constituting a defense*, within the meaning of the rules and practice of this court, that should entitle the moving party to reply. If the respondent desired to use them, we think these supporting affidavits, so far as they relate to the condition of the dam at the time the order to show cause was obtained, should have been served as a part of the moving papers, so that complainant could have an opportunity to reply specifically to each fact. The affidavits are *ex parte*, no opportunity for cross-examination having been afforded. As they were not served as a part of the moving papers, if they are to be considered at all, or even so far

as they relate to the subsequent condition of the dam, we think the second batch of affidavits in response should also be considered.

The respondent originally rested its application upon the two affidavits of the engineers, which its counsel, doubtless, deemed sufficient, describing the plan and construction of the dam, and giving their opinion of its operation and efficiency, and the complainant in the bill put in two counter-affidavits of other engineers, controverting the positions in some particulars of their opponents. Complainant might well be content to oppose his two witnesses to the two of the moving party upon the points covered by the affidavits, when he would not have done so had they been supported in their position by seven other witnesses. To receive these seven supporting affidavits, and reject those offered by complainant to contradict them and support his own, would be giving respondent an unfair and inequitable advantage. If one set of supporting affidavits is considered, the other must be also, and, as there are some peculiarities in the case, it is perhaps best to consider both. But, under the view we take in this particular case, it is a matter of little consequence, except so far as it is desirable to insist upon correct practice, how we rule on this point, for the result must be the same in either event.

Upon the affidavits of the moving party, both originally and subsequently filed, taken either with all the affidavits of the complainant, or with the affidavits of the two engineers alone, presented by him, we are by no means satisfied that the dam in question—a dam 40 feet high, erected on a bed of *debris* already 60 feet deep, brought down from the mines as the result of previous washing—is sufficient to either permanently, or for any considerable period of time, accomplish the intended purposes, and adequately protect the complainants from the mining *debris* to be discharged into Bear river. In the face of the conflicting views of engineers on the subject, it is impossible to be satisfied of the sufficiency of this dam. The whole matter rests in mere opinion. We have no right to blindly speculate upon matters of such consequence. With our limited facilities, we cannot foresee, with reasonable certainty, what may occur in these mountain rivers, confined in deep canons, which sometimes become irresistible torrents.

Nothing short of the attribute and prescience of omniscience is equal to the task of determining the absolute sufficiency of such a dam, and nothing should be accepted as sufficient, except upon the most indisputable and demonstrative evidence. Where the earth and other material displaced in mining are removed from their bed, and cast into the main rivers in the mountains, they at once become subject to the operation of the tremendous forces of nature, against which the puny efforts of man can interpose but feeble barriers, at best,—can accomplish but little. A small beginning, arising from slight causes, originating in accident or design, or from the active forces of nature, may soon develop into a destructive breach in a dam

like that in question. Malice may instigate the application of dynamite, and the blowing up of the dam, as was claimed by the owners to be the case—although it is not a known fact—with the English dam some three years ago, and is now claimed with respect to the *debris* dam in Humbug canon. The English dam had been constructed with the highest degree of engineering skill, by parties whose *highest interests* required that it should be absolutely sufficient and safe under all contingencies; yet, through accident, malice, the forces of nature, or some other cause unknown, it gave way, and precipitated its destructive flood of water, in 10 hours, upon the plains 85 miles distant below, breaking, in several places, where the water channel was more than a mile wide, levees that had withstood the ordinary floods of the rainy seasons, and doing great damage to the surrounding country. *Debris Case*, 9 Sawy. 484; S. C. 18 Fed. Rep. 766.

The lamentable failure of the state in building *debris* restraining dams under the direction of its own engineers, after an expenditure of half a million of dollars, and the equally unsuccessful efforts of private mining companies shown in the *Debris Case*, 9 Sawy. 480, S. C. 18 Fed. Rep. 763, furnish a warning against relying too confidently upon the skill or opinions of engineers, however eminent. The restraining and impounding dams erected by the state, whose interest it was to make them sufficient, were in the plains, on comparatively low grades. That of the English dam, doubtless, was in a more difficult position, and was a water dam merely. These were on a larger scale, it is true, and, possibly, some of them in more dangerous positions, than the present one; but, if so, it is only a difference in degree. The same principles of physics and dynamics underlie and control and govern them all. It is not for us, with our limited faculties, to estimate and speculate upon possibilities, and measure off and lay down a line indicating just how far trespassers may encroach upon the domain and overpowering forces of nature, within the supposed limits of reasonable possibility or probability, with safety to the rights of the parties below upon whom the trespasses are committed. A court having power to enjoin the nuisance might, with just as much propriety, refuse an injunction against the erection by the owner on his own premises of a magazine for the storage of gunpowder and dynamite, adjoining and next to his neighbor's house, upon the evidence of experts in the matter that the magazine is constructed with the most perfect skill, and that it is and will be guarded by all the means for securing safety known to science. Such a magazine might never explode, yet it is liable to explode at any moment. And the same would be true of one of these restraining *debris* dams, built across one of these main mountain rivers, liable to become roaring torrents. It might not give way for years, yet it is liable to do so at any time during a flood.

If restraining dams must be relied on by the inhabitants of the valleys of California to protect them from destruction from mining

debris, it would seem that such dams should be constructed by or under the supervision, and in accordance with the ideas, of the parties in danger and liable to be injured, rather than under the supervision, and according to the views, of those who commit the trespasses and perform the acts which give rise to the danger, and whose interests are not endangered, or in any respect liable to suffer. The party in danger should be the party to determine the measure of his protection,—not the party creating the danger for his own benefit.

It is for the pecuniary interest of hydraulic miners to get out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of his. As human nature is constituted, the action of parties so situated, set in motion by an application of the coercive powers of the law, in the erection, at their own expense, and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespasses, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each man shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold-bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All doing injury must be stopped or restrained from contributing to further injury, or none.

In discussing this subject in the *Mining Debris Case*, 9 Sawy. 537, S. C. 18 Fed. Rep. 803, we said, respecting the general practicability of building safe impounding dams:

"As is usually the case, the views of different engineers and experts, distinguished in their profession, differ widely upon the point of practicability and safety. The larger number of witnesses called, and much the larger amount of testimony in this case, so far as mere opinion goes, are, doubtless, in favor of the practicability, *if sufficient means are furnished*. But all the practical experiments heretofore made, at great expense, under the supervision of the state, and of competent engineers, have been lamentable failures. The dams constructed were, doubtless, in many particulars defective. But what guaranty has the court, and those whose lives and property are at stake, that any future works of the kind will not also be defective? As at present advised, with some knowledge of the tremendous forces of nature, we cannot undertake to say, upon the mere opinion of experts generally at variance, as in this case, however competent, that the scheme would be practicable and safe. We cannot define in advance w^hat works shall be suffi-

cient, and authorize the continuance of the acts complained of upon the performance of any prescribed conditions. In view of past experience here and elsewhere, with the damming up of waters, and of the wide difference of opinion of competent engineers on the subject, it is clear that *we should not be justified in an attempt to prescribe in advance any kind of a dam under which a large community shall be compelled to live, in dread of a perpetual, seriously alarming, and ever present, menace.*"

My associate added :

"Besides, it is a very serious question in my mind whether any person or community can or ought to be required to submit to the continuous peril of living under or below such a dam as this must necessarily be, if it is made high enough to impound the coarse material; and this, merely for the convenience of another person or persons in the pursuit of his or their private business. It may be likened, at least, to living in the direct pathway of an impending avalanche." Id. 551.

The more we reflect upon this point the more confident we are in the soundness of the views there expressed. We cannot know whether the dam in question will be sufficient for the purposes indicated, or whether it will be kept in repair, and continue to be adequate; and we have no right to speculate upon what may happen at the expense of or peril to the safety of complainant, and numerous others occupying similar situations. We might as well undertake to prescribe in advance the kind of dam that would be deemed and held sufficient and satisfactory, as to determine now whether this dam will now be, and hereafter continue to be, adequate to the purposes intended. We cannot undertake to do either. We cannot undertake to set bounds to the operations of the forces of nature, where the rights of others are liable to be thereby seriously injured should these bounds be erroneously fixed.

Although we do not claim to be experts in these matters, yet, with some knowledge of physics, and the laws which govern the forces of nature, and with no inconsiderable observations of the results of their operation, we cannot say, even upon the very intelligent affidavits of the moving party's witnesses, without considering the complainant's affidavits at all, that we are satisfied that the dam in question is or will be sufficient for the purposes intended, or at all adequate to protect the complainant, and others similarly situated, from further injury. And this want of satisfaction is largely increased by the opposing opinions and statements of the engineers whose affidavits, apparently equally intelligent and reliable, were taken and presented on behalf of the complainant. We are fully satisfied that the motion to modify the injunction should be denied, and that the order suspending its operation should be vacated.

Both witnesses and counsel state that they have constructed this dam upon the suggestion of the court upon the subject, apparently intimating that, having done so, the court is committed to their view as to their rights. If this is the supposition, it is not perceived how any such idea could have been derived from anything said in

the *Debris* or any other case. Indeed, all that was said in the discussion of the questions in that case, as will be seen from the extracts given, leads in a contrary direction. The case was a new one, involving vast interests. The manifest hardship of stopping hydraulic mining, upon mining investments was painfully evident to the court; and being extremely anxious not to interfere with those interests any further than was absolutely necessary to protect the rights of others wrongfully injured by these operations, and wishing to be in a position to relieve the mining interests from any unnecessary hardship, should any change of conditions or other contingency arise by which it could properly be obviated, it was in conclusion observed:

"As it is possible that some mode may be devised in the future for obviating the injuries, either one of those suggested, or some other successfully carried out, so as to be both safe and effective, a clause will be inserted in the decree giving leave on any future occasion, when some such plan may have been successfully executed, to apply to the court for a modification or suspension of the injunction."

The clause suggested, whether wisely or not we do not yet know, was accordingly inserted in the decree. But it in no degree indicated what would be deemed "safe and effective" to protect the interests of the parties in such sense as to justify a modification of the decree; and there was, certainly, no indication as to what means would be "safe and effective" as to the mine then in question, and much less at the point where the dam now under consideration is located.

Let the motion be denied, and the order temporarily suspending the operation of the injunction against the Liberty Hill Consolidated Mining & Water Company be vacated, and the injunction reinstated.

CENTRAL TRUST CO. *v.* WABASH, ST. L. & P. RY. CO. (HANNIBAL
WATER CO., Intervenor.)¹

(Circuit Court, E. D. Missouri. June 26, 1886.)

WATER COMPANIES—CONTRACTS—SALES—RAILROADS.

Where, under a contract with a water company, a railroad is authorized to use a specified quantity of water for so much per annum, but consumes only a portion of that quantity, it cannot sell the balance.

In Equity.

This is an action to recover the value of water taken by the receivers of the Wabash, St. Louis & Pacific Railway Company from the mains of the intervenor, at the round-house of the Missouri Pacific Railway Company. The defense is that the water was sold to the defendant by the Missouri Pacific Railway Company, and that the

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

latter had a right, under its contract with intervenor, to make the sale. Said contract provides that the intervenor shall furnish water to the Missouri Pacific Railway Company, "at Hannibal station, in their tank, at round-house, and at Penstock, * * * for the general uses of the road at this point, for a term of ten years, * * * for the sum of \$1,080 per annum. * * * It is further agreed and understood that the above price * * * is based on an average daily consumption of 50,000 gallons, to be determined either by meter measurement or by the estimated capacity of the engines watered. * * * When said daily average shall exceed 50,000 gallons, the party of the second part shall pay for such excess at the rate of 10 cents per 1,000 gallons." The amount used by both the Wabash and the Missouri Pacific Railway Company did not exceed 50,000 gallons per month.

H. D. Wood, for intervenor.

G. S. Grover, for receivers.

TREAT, J., (*orally*.) In the matter of the intervening petition of the Hannibal Water Company, according to the terms of the contract submitted to the court, it appears that an arrangement was made between the intervenor and the Missouri Pacific Railroad for the supply of water, determined by the provisions of said contract. There was no authority on the part of the Missouri Pacific Railroad to sublet or furnish supplies to other parties. It having done so, and received from the respondent in this case that amount of money, it should refund the same, for the value of the water supplied belongs to the intervenor, and not to the Missouri Pacific.

In re NORTH BLOOMFIELD GRAVEL MIN. CO.

WOODRUFF *v.* NORTH BLOOMFIELD GRAVEL MIN. CO. and others.

(*Circuit Court, D. California.* May 9, 1886.)

CONTEMPT—VIOLATION OF INJUNCTION—MINING DEBRIS.

Running a tunnel 2,500 feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks, occurring from time to time, by a hydraulic monitor, and other washings of earth and *debris* by water flowing over the high banks of the mine into a tributary of the Yuba river, is a violation of the injunction perpetually restraining defendants "from discharging or dumping into the Yuba river, or its tributaries, any of the tailings, boulders, cobble-stones, gravel, sand, clay, *debris*, or other refuse matter," from any of their mines; constitutes a violation of the injunction; and a contempt. Punishment: A fine of \$1,500 imposed as a punishment for the contempt.

Before SAWYER, J.

MASTER'S REPORT.

The evidence clearly shows that, since the date of the filing of the decree herein, mining tailings have been discharged into Humbug creek by the respondent the North Bloomfield Gravel Mining Company, from its mine described in the bill. With reference to the character and extent of the mining operations which have been carried on in said mine since the date referred to, it appears from the testimony that in June, 1884, the said respondent commenced the construction of a tunnel along the bed-rock in its mine, for the purpose of drift mining; that drift mining has been there carried on continuously from that time to the present; and that, up to the present time, 2,500 or 3,000 feet of tunnel and drifts, seven feet high, and averaging four and a half feet wide, have been run. The drift tunnel was started in the mine on the channel, at the base of a point or pinnacle projecting into the excavation, from its northerly bank, about 20 or 30 feet; the height of said point or pinnacle at that time being about 150 feet, and its present height being 50 to 100 feet. In the same month (June, 1884) a 22-inch pipe, terminating with a hydraulic monitor, was placed, and has ever since remained, in a position commanding the mouth of the drift tunnel, distant therefrom about 100 to 150 feet eastwards. To the west of the tunnel mouth, at about an equal distance, is the terminal point of a 15-inch pipe, bearing the lower joint or "knuckle" of a monitor. The chief purpose of both of these pipes was to provide streams of water to be used for the protection of the drifting operations. Water driven through the monitor washed away material which caved or was washed down from the banks, and which covered or threatened the mouth of the tunnel. The other pipe mentioned terminated upon the west side of the tunnel mouth, where the banks of the excavation were less liable to injurious caving; and the intention was that, should the caved bank cover the end of this pipe, and the bed-rock in its neighborhood, a stream of water passing through the pipe, and out at the knuckle, would wash away the fallen material. In case of a serious cave of the bank upon that side, a monitor nozzle could readily be adjusted upon the knuckle, and the caved gravel piped away. Water flowing through a branch of the eastern pipe mentioned washed into the outlet tunnel, and into the creek, the material resulting from the drifting operations.

As previously stated, the location of the monitor has not been changed since it was placed in position, about the time the work of drifting commenced; and the material which has been removed from the vicinity of the drift tunnel in the mine is not of great quantity, when compared with that which would have been run off had the monitor been moved from place to place, and kept in constant operation, as in former times. Still, a considerable quantity of mining tailings has undoubtedly been discharged into the creek from respondent's mine since the date of the decree. During the entire period which has elapsed since that date, at least 1,000 miner's inches of water has daily, with the exception of short intermissions for repairs to flumes, been run into and through the mine, either through pipes, or over the banks of the excavation.

The drift tunnel was started near the center of a bend in the northern bank of the excavation; and, when preparations for drifting were commenced, a moraine, composed of material which had fallen from the banks, lay on the bed-rock in the immediate vicinity of the present location of the drift tunnel mouth. The form of the moraine was triangular, its base being about 250 or 300 feet across, and its two sides running up to a point at or near the center of the bend referred to. The slope of the moraine from base to apex was gradual, and its depth varied from nothing at the base to 25 or 30 feet at the apex. A channel through this mass, from five to eight feet in width, was made by water flowing into the mine through the Malakoff ravine, and the

remainder of the moraine has since been washed away. In the bank on each side of the projection in which the mouth of the drift tunnel is located, a chasm or gorge has been washed back two or three hundred feet, its width being two or three feet at the bottom and about one hundred feet at the surface, the banks in that locality being of a height of at least two hundred feet. Some portion of the bank in the vicinity of the drift tunnel mouth has also been washed away. Some portion, however, of the gravel which has caved from the top of the pinnacle which overtops the drift tunnel, and some of the material which has fallen from the banks upon either side, still remains within the excavation, as it fell. The testimony also shows that water has been run over the embankment, and so through the outlet tunnel into Humbug creek, at other places than at those mentioned above.

I therefore find, and do report, that, since June, 1884, the North Bloomfield Gravel Mining Company, respondent, has been continuously engaged in practical drift mining in its mine described in the bill herein; that, in prosecuting, facilitating, and protecting such drift mining operations, said respondent has removed from its said mine, and discharged into Humbug creek, a tributary of the Yuba river named in the decree herein, a considerable quantity of mining tailings; that mining tailings, in much less quantity, have also been by said respondent discharged from its said mine into said creek, by means of water run from ditches over the banks of said mine; and that thereby said respondent has violated the decretal order of this court, and is in contempt.

Respectfully submitted,

S. C. HOUGHTON, Master.

A. L. Rhodes and A. L. Hart, for complainant.

Stewart & Herrin, for respondent.

SAWYER, J. The master reports that, since the entry of the decree, "mining tailings have been discharged into Humbug creek by the respondent, * * * from its mines described in the bill." After stating that respondent had run some 2,500 to 3,000 feet of tunnel for drift mining, and carried on drift mining continuously from June, 1884, washing the *debris* arising from such mining, and from caves of the bank occurring from time to time, washed away by monitors properly located for the purpose, into the creek wherein the *debris* had theretofore been discharged, and giving particulars of the operations of respondent, he concludes:

"I therefore find and report that since June, 1884, the North Bloomfield Gravel Mining Company, respondent, has been continuously engaged in practical drift mining in its mine described herein; that in prosecuting, facilitating, and protecting such drift mining operations, said respondent has removed from said mine, and discharged into Humbug creek, a tributary of the Yuba river named in the decree herein, a considerable quantity of mining tailings; that mining tailings, in much less quantity, have also been discharged from its said mine into said creek, by means of water run from ditches over the banks of said mine; and that thereby said respondent has violated the decretal order of this court, and is in contempt."

No exceptions to the master's report were filed by respondent, and there was no good ground for exception; but the complainant filed several exceptions upon the ground that upon various points the findings are not so strongly put against said respondent as the testimony requires, and on the ground that he did not find that the violation of the injunction was willful. The testimony upon which the findings

are based was reported in full, in pursuance of the order. After a careful examination of the evidence, I am satisfied that the master has made an intelligent, fair, and impartial report; but it is certainly fully as favorable to the respondent as it was entitled to expect, and is sufficient, without modification, in the light of the testimony, to enable the court to make a proper disposition of the question of contempt.

The respondent insists that the mining done being "drift mining," as its counsel term it, and the hydraulic washing performed by means of the monitor being such as was incident to the drift mining, and was necessary to the protection and successful carrying on of drift mining, there was no violation of the injunction. It is insisted that this drift mining, and its incidents, are not within the terms of the decree; or, if otherwise, that the decree is broader than is justified by the allegations of the bill, and to that extent should not be enforced. I cannot assent to this view. It is true that the bill describes the operations carried on by respondent by means of which the *debris* is thrown into the streams, as hydraulic mining. But this is only a means by which the *debris* which works the mischief is discharged into and deposited in the stream, and sent on its destructive course. The thing sought to be restrained is not hydraulic mining,—merely the means by which the *debris* is discharged into the stream. It is not sought to restrain hydraulic mining in itself, or as an occupation, but only so far as it is a means of injury.

The complaint is that the *debris* is discharged into and deposited in the streams, to complainant's injury; that "with full knowledge of the irreparable damage to your orator caused, and to be caused, by the aforesaid use of the channels of the foregoing described streams, as a place of deposit and wastage of the tailings of these said mines, * * * they make the announcement of their intention to continue to use the channels of the Yuba river, and its tributaries, aforesaid, as a place of deposit for their tailings from their aforesaid mining claims," etc.; and that they "claim a common right to deposit the tailings and *debris* from their several mines in the Yuba river and its tributaries," etc. The prayer of the bill is for an injunction, not against hydraulic mining merely, but "enjoining them, and each of them, from discharging or dumping into the Yuba river, or any of its forks or tributary streams, or into Deer creek, any of the tailings, boulders, cobble-stones, gravel, sand, clay, *debris*, or refuse matter, from any of their said tracts of mineral lands or mines; and also from causing or suffering to flow into said creeks, or tributary streams aforesaid, any tailings, boulders, cobble-stones, gravel, sand, clay, or refuse matter therefrom," etc., and the decree conforms to the prayer, and provides that the said defendants, "and their and each and all of their servants, agents, and employes, are perpetually enjoined and restrained," not from hydraulic mining, but "from discharging or dumping into the Yuba river, or into any of its forks or branches, or

into any stream or tributary to said river, or any of its forks or branches, and especially into Deer Creek, Sucker Flat ravine, Humbug creek, Scotchman's creek, any of the tailings, boulders, cobblestones, gravel, sand, clay, *debris*, or refuse matter from any of the tracts of mineral land or mines described in the complaint; and also from causing or suffering to flow into said rivers, creeks, or tributary streams aforesaid, therefrom, any of the tailings, boulders, cobblestones, gravel, sand, clay, or refuse matter resulting or arising from mining thereon." If respondent can work their mines by the hydraulic process or otherwise, without discharging their refuse matter into the streams, they are at full liberty to do so.

This language was carefully considered when the terms of the decree were settled, and I do not think it broader or more comprehensive than either the prayer or the allegations in the body of the bill justified. It can make no difference whether the refuse matter is thrown into the streams by what is strictly called hydraulic mining or drift mining. This can only be a question of degree in the injury resulting. The acts found by the master are clearly within the terms of the decree and the acts complained of. Indeed, if the decree could be limited, as to *debris* thrown into these streams, to hydraulic mining alone, I think the acts reported by the master, and, especially, as shown by the testimony taken, constitute "hydraulic mining," within the proper meaning of the term as used in the bill. There was, certainly, considerable "hydraulic mining" within the narrowest meaning of the term.

There is, in my judgment, no matter of estoppel in the observations of counsel made during the progress of the trial. Until reversed, the rights of the parties are settled by the decree and the pleadings upon which it is founded. There is no evidence of the complainant's having assented to, or having induced, any violation of the injunction since the entry of the decree. The respondent, therefore, must be adjudged to be in contempt.

It only remains to determine the punishment that should be inflicted for the contempt adjudged. As this is the first occasion in this court of the kind, and the defendant disclaims any intent to disregard the decree of the court, and its officers profess to believe that mining in the mode pursued by them, which they call "drift mining," would not be a violation of the injunction, and considering the observations of complainant's counsel at the trial, I shall not be severe, in view of the immense interests affected, and the amount of the proceeds of the mine resulting from the violation of the injunction. Considering the amount of work performed, which although far below what had formerly been accomplished, the amount of *debris* discharged into the streams was by no means inconsiderable. The decree in this case is either right or wrong. If right, there can, properly, be no temporizing or compromise by allowing some wrong to be done. The wrongful acts of filling the streams with the *debris*, to the injury

of parties below, by whatever means accomplished, must be wholly stopped, in all cases, or the rights of the injured parties cannot be efficiently protected. Having no doubt, myself, of the propriety of the decree, in all its parts, it is my imperative duty to hereafter enforce it, if necessary, by all the sanctions afforded by the law. If wrong, it can readily be corrected on appeal. Let judgment for a fine of \$1,500 be entered, with costs. As a compensation, in part, for the large expenses that must have been incurred in procuring evidence and prosecuting this proceeding for contempt, the money, when collected, will be paid over to complainant or his solicitors.

Let judgment be entered accordingly.

KING IRON BRIDGE & MANUF'G CO. v. COUNTY OF OTOE.

(Circuit Court, D. Nebraska. June 4, 1886.)

1. STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN—NEBRASKA STATUTE—COUNTY WARRANTS.

The right of action upon county warrants accrues upon the refusal of the treasurer to pay them on presentation, and the statute of limitations of Nebraska begins to run from that time.¹

2. SAME—ACTION, WHEN BARRED.

An ordinary action of debt cannot be maintained in this court to enforce the payment of county warrants, unless the suit is brought within five years from the time the cause of action accrues.

Debt on County Warrants. Demurrer to answer.

This suit is based upon two county warrants, properly drawn upon the treasury of the defendant, which were duly presented for payment, but were not paid for want of funds to meet the same. The one warrant was issued to Z. King or order, on the ninth October, 1878, for \$1,605, and was presented to the treasurer for payment on the twenty-third day of October, 1878, and indorsed by the treasurer: "Presented, and not paid for want of funds." The other warrant was issued to the said King on the ninth January, 1879, for \$1,605, and was presented for payment on the fifteenth January, 1879, and was by the county treasurer duly indorsed: "Presented, and not paid for want of funds." This suit was commenced on the tenth day of November, 1885. The defendant pleads the statute of limitations, and relies upon that defense alone. The plaintiff demurs to the answer.

N. S. Harwood, for plaintiff.

J. C. Watson, for defendant.

DUNDY, J. When a claim against a county has been audited, and warrants have been drawn on the treasury therefor, and such war-

¹See note at end of case.

rants have been accepted by the creditor, he must present them to the treasury for payment before he can properly sue the county thereon. When presented to the treasurer for payment, and payment is refused, the right to sue becomes complete and absolute, and the lawful holder of the warrants can then proceed to have his claim reduced to judgment. There was nothing whatever in the way of Z. King, the payee, or the plaintiff, his assignee, suing on said warrants at any time after the fifteenth day of January, 1879. The cause of action had accrued on both the warrants at that time, and the statute of limitations commences to run as soon as the cause of action accrues. We have this provision in our statute of limitations, on which the defendant relies:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued: * * * Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment." See sections 9, 10, pt. 2, Code Civil Proc.

This suit was commenced nearly seven years after the cause of action accrued. It seems to me to come fully within the provisions of the section of the Code above quoted. The action was not brought in time. The statute of limitations is therefore well pleaded. It follows that the demurrer to the answer must be overruled.

The plaintiff may, at its option, take leave to reply, or dismiss this action without prejudice, in 10 days. So ordered.

BREWER, J., concurs.

NOTE.

Statutes of limitations are statutes of repose, *Hurley v. Cox*, (Neb.) 2 N. W. Rep. 705; *Letson v. Kenyon*, (Kan.) 1 Pac. Rep. 562; *Taylor v. Miles*, 5 Kan. 499; *Elder v. Dyer*, 28 Kan. 604, and are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the court has been taken away; for in such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have. *Greenwald v. Appell*, 17 Fed. Rep. 140.

The object of the statute is to suppress fraudulent and stale claims, and prevent them from showing up at great distances of time, and surprising the parties or their representatives when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. *Hurley v. Cox*, (Neb.) 2 N. W. Rep. 705; *Spring v. Gray*, 5 Mason, 523.

Where a statute of limitations provided that in cases where the cause of action had already accrued at the passage of the act a party should have the whole period prescribed by the act, after its passage, in which to commence action, and by another act of the same legislative session it was provided that said statute and others should take effect at a day subsequent to the date of their actual passage and approval by the governor, it was held that the period of limitation did not begin to run until the statute took effect, as provided in the second act. *Schneider v. Hussey*, (Idaho,) 1 Pac. Rep. 343; *Rogers v. Vass*, 6 Iowa, 408.

1. AGENTS. As a general rule the statute of limitations does not commence to run in favor of an agent and against his principal until the principal has knowledge of some wrong committed by the agent inconsistent with the principal's rights. *Perry v. Smith*, (Kan.) 2 Pac. Rep. 784; *Green v. Williams*, 21 Kan. 64; *Auld v. Butcher*, 22 Kan. 400; *Kane v. Cook*, 8 Cal. 449; *Ang. Lim. § 179 et seq.*; 7 Wait, Act. & Def. 238.

But it has been held that where an agent is appointed to collect money and remit, after deducting his reasonable charges, and fails to do so after a reasonable time, the statute of limitations commences to run. *Mast v. Easton*, (Minn.) 22 N. W. Rep. 253. See *Stacy v. Graham*, 14 N. Y. 492; *Little v. Hoyt*, 5 Hill, 395; *Hart's Appeal*, 32 Conn.

520; Campbell's Adm'rs v. Boggs, 48 Pa. St. 524; Denton's Ex'rs v. Embury, 10 Ark. 228; Estes v. Stokes, 2 Rich. Law. 133; Mitchell v. McLemore, 9 Tex. 151; Hawkins v. Walker, 4 Yerg. 188.

The fact that the principal did not know when the claim was collected, and hence did not know that the agent had failed in the performance of his duty, and that a right of action had accrued, will not effect the running of the statute. *Mast v. Easton*, (Minn.) 22 N. W. Rep. 253; *Cock v. Van Etten*, 12 Minn. 522, (Gil. 431.)

2. **BANKRUPTCY.** The statute of limitations is no bar to proof in bankruptcy if it had not run against the claim at the commencement of the proceedings in bankruptcy, *In re McKinney*, 15 Fed. Rep. 912; and no lapse of time will prevent the proof of the claim before the register, up to the final distribution of dividends. If it is so barred by the statute before the adjudication, it will remain barred, and the claim cannot be proven. *In re Graves*, 9 Fed. Rep. 816.

3. **BILLS, ETC.** In a suit by the drawee of a bill of exchange against an indorser, where such bill was drawn by the treasurer of the United States, and the name of the payee forged, the statute of limitations does not begin to run until judgment has been obtained by the United States against the drawee. *Merchants' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 3 Fed. Rep. 66.

a. *Claims Payable on Demand.* Where no time is specified within which a loan of money is to be repaid, the presumption of the law is that it was to be paid on demand, and the statute of limitations commences to run from the time of the loan. *Dorland v. Dorland*, (Cal.) 5 Pac. Rep. 77; *Ang. Lim.* § 95.

On a due-bill without day of payment a cause of action accrues on delivery, and the statute begins to run. *Douglass v. Sargent*, (Kan.) 4 Pac. Rep. 861. See *Palmer v. Palmer*, 36 Mich. 487; *Herrick v. Woolverton*, 41 N. Y. 581; *Wheeler v. Warner*, 47 N. Y. 519; *Stover v. Hamilton*, 21 Grat. 273; *Bowman v. McChesney*, 22 Grat. 609.

In an action to recover from a bank a general deposit, the statute does not commence to run until a demand, unless the demand has been in some way dispensed with. *Branch v. Dawson*, (Minn.) 23 N. W. Rep. 552.

And the same is true of an "special deposit." *Smiley v. Fry*, (N. Y.) 3 N. E. Rep. 186.

4. **BONDS.** a. *Administrator's Bond.* The liability of a surety on an administrator's or executor's bond is not fixed, and no cause of action arises thereon until there is a judicial ascertainment of the default of the principal, and from this time the statute of limitations begins to run. *Alexander v. Bryan*, 4 Sup. Ct. Rep. 107.

This judicial ascertainment must be something more than the mere auditing of the accounts. There must be a decree ordering payment, on which process to collect can issue against the principal. *Id.*

b. *Appeal Bonds.* The statute commences to run in favor of sureties on an undertaking on appeal from the date of the affirmance of the judgment to which it relates. *Clark v. Smith*, (Cal.) 6 Pac. Rep. 732; *Crane v. Weymouth*, 54 Cal. 480; *Castro v. Clarke*, 29 Cal. 11.

c. *Guardian's Bond.* The statute commences to run against suit on guardian's bond when the person ceases to be guardian. *Probate Judge v. Stevenson* (Mich.) 21 N. W. Rep. 348; and in case of a default, a right of action first accrues to the ward when amount of such default is ascertained by the court in the settlement of the guardian's final account, and from this time the statute runs. *Ball v. La Clair* (Neb.) 22 N. W. Rep. 118.

d. *Public Officer's Bond.* The statute does not commence to run in favor of sureties on the bond of a public officer until the liability of their principal has been fixed. *Lawrence v. Doolan*, (Cal.) 5 Pac. Rep. 434.

And it has been held that where an assessment of damages for a right of way is paid to a sheriff, the statute begins to run against an action on sheriff's bond to recover such assessment when the time fixed by law for appeal has expired. *Lower v. Miller*, (Iowa,) 23 N. W. Rep. 897.

5. **BOOK-ACCOUNTS.** On the settlement of a book-account it has been held that the statute of limitations begins to run from the time the account is settled, and not from the time of the discovery of facts showing that such settlement was fraudulently made. *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. Rep. 261.

On an open, mutual account the statute does not commence to run until the date of the last item charged. *Hannon v. Engelmann*, (Wis.) 5 N. W. Rep. 791.

Where an open account is closed by an agreement that certain parties shall assume payment, the statute runs from the date of such agreement. *Hammond v. Hale*, (Iowa,) 15 N. W. Rep. 585.

But where the items of an account are all charged against one party it is not a mutual account, *Pitzpatrick v. Henry*, (Wis.) 16 N. W. Rep. 606; *Butler v. Kirby*, 53 Wis. 188; *S. C.* 10 N. W. Rep. 373; *Ang. Lim.* §§ 148, 149; and each item will stand, as regards the

running of the statute, as though it stood alone. *Courson's Ex'rs v. Courson*, 19 Ohio St. 454. See *Blair v. Drew*, 6 N. H. 235; *Smith v. Dawson*, 10 B. Mon. 112; *Craighead v. Bank*, 7 Yerg. 399; *Lowe v. Dowborn*, 26 Tex. 507; *Cottam v. Partridge*, 4 Man. & G. 271; *Williams v. Griffiths*, 2 Crompt., M. & R. 45; *Tanner v. Stuart*, 6 Barn. & C. 603; *Bell v. Morrison*, 1 Pet. 351.

6. CONTRIBUTION. On an action for contribution by one of the sureties on a note against whom a judgment has been taken for the full amount, the statute begins to run from the date of the payment of such judgment. *Preston v. Gould*, (Iowa,) 19 N. W. Rep. 834. See *Lamb v. Withrow*, 31 Iowa, 164; *Johnston v. Belden*, 49 Iowa, 301.

7. CONVERSION. The statute commences to run against an action for conversion from the date of such conversion. *Doyle v. Callaghan*, (Cal.) 7 Pac. Rep. 418.

8. CORPORATION—MUNICIPAL. In an action against a municipal corporation for damages for an injury caused by defective sidewalk, the statute begins to run from the time when such claim is disallowed, or the failure of the council to act on the matter amounting to a disallowance. *Watson v. City of Appleton*, (Minn.) 22 N. W. Rep. 475.

It was held by the supreme court of Ohio in *Perry Co. v. Railroad Co.*, 2 N. E. Rep. 854, that where a railroad company had injured a county bridge, that the statute did not begin to run against a claim on the part of the county against the railroad company for damages until after the bridge had been restored to its former condition by the county commissioners.

9. CORPORATIONS—STOCKHOLDERS. In an action against a stockholder to subject his unpaid shares of stock to satisfaction of a judgment against a corporation, the statute begins to run when the cause of action against the corporation accrued. *First Nat. Bank of Garrettsville, Ohio, v. Greene*, (Iowa,) 17 N. W. Rep. 86; affirmed on rehearing, 20 N. W. Rep. 754; *Baker v. Johnson Co.*, 33 Iowa, 155. See *Prescott v. Gonser*, 34 Iowa, 175; *Beecher v. Clay Co.*, 52 Iowa, 140; *S. C. 2 N. W. Rep. 1037*.

Where one corporation transferred to another all its property, except its franchise, and such other corporation assumed to pay all debts, and a creditor of the grantor, whose claim of action arose before the conveyance was executed, but not yet barred by the statute of limitations, brought suit at law against the grantor, and obtained judgment on which an execution was issued, but returned unsatisfied, and then, after the time fixed by the statute of limitations had run since the cause of action arose against the grantor, brought suit in equity against the grantor and the grantee, it was held that the claim was neither barred by laches nor the statute of limitations. *Fogg v. St. Louis, H. & K. R. Co.*, 17 Fed. Rep. 871.

As to an action by stockholder suing in his own name for benefit of all stockholders against directors for misappropriation, etc., see *infra*, 31, a.

10. CO-TENANTS. The statute does not run as against tenants in common until actual ouster. *Hume v. Long*, (Iowa,) 5 N. W. Rep. 193.

A quitclaim deed by one tenant in common will not set the statute running as against other tenants in common. *Moore v. Antell*, (Iowa,) 6 N. W. Rep. 14; *Hume v. Long*, (Iowa,) 5 N. W. Rep. 193.

11. COVENANT. The statute of limitations commences to run against a covenant from the time substantial damage is sustained. *Post v. Campau*, (Mich.) 3 N. W. Rep. 272.

Where land, the paramount title being in another, is conveyed with covenant of seizin, the covenant is broken on the delivery of the deed, and the statute begins to run. *Sherwood v. Landon*, (Mich.) 23 N. W. Rep. 778; *Matteson v. Vaughn*, 38 Mich. 373.

12. DECEDENTS, ESTATES OF. The statute commences to run against a rejected claim on the estate of a decedent from the time of its actual rejection. *Bank of Ukiah v. Shoemaker*, (Cal.) 7 Pac. Rep. 420.

A claim against an estate is not barred because not presented for allowance in time, when, at that time, there was no claim which could be presented for allowance against the estate. *Ford v. Smith*, (Wis.) 18 N. W. Rep. 925.

Where a cause of action accrues to a person's estate after his death, the statute of limitations commences to run from the date of the accrual, *Hibernia S. & L. Soc. v. Conlin*, (Cal.) 7 Pac. Rep. 477; *Tynan v. Walker*, 35 Cal. 634, although there was no person in existence competent to sue, and continues to run from such date without cessation *Tynan v. Walker*, 35 Cal. 634; for where the statute of limitations once begins to run no subsequent disability will stop its running. *Oliver v. Pullan*, 24 Fed. Rep. 127.

13. DOWER. The statute of limitations does not commence to run against an action to recover dower until there is an adverse possession of the land. *Felch v. Finch*, (Iowa,) 3 N. W. Rep. 570; *Phares v. Walters*, 6 Iowa, 106; *Starry v. Starry*, 21 Iowa, 254; *Rice v. Nelson*, 27 Iowa, 153; *Sully v. Nebergall*, 30 Iowa, 339.

14. FRAUD. The statute of limitations does not run against an action based on a fraud until the discovery of the fraud. *Perry v. Wade*, (Kan.) 2 Pac. Rep. 787; *Clews v. Traer*, (Iowa,) 10 N. W. Rep. 838; *Voss v. Bachop*, 5 Kan. 59.

It was recently held by the supreme court of Pennsylvania, in the case of *Hughes v. First Nat. Bank of Waynesburg*, 1 Atl. Rep. 417, that where government bonds were deposited with a bank for safe-keeping and afterwards pledged by the bank as collateral security for its own debts, and actually sold by the holder, that the putting off of the depositor or his representative from time to time with promises to return the bonds so pledged, the interest being paid in the mean time, is such fraud and concealment as will toll the running of the statute of limitations.

The question of discovery of fraud is a question of fact and must be properly pleaded. *Johnson v. Powers*, 13 Fed. Rep. 315.

Where it is alleged in the petition that the fraudulent transaction was studiously concealed from plaintiff and his assignor, and that he and his assignor had no means of discovering the same, and did not know thereof until they were disclosed in the examination of a witness in a suit on a day named in the petition, this allegation is sufficient to take the case out of the statute. *Traer v. Clews*, 6 Sup. Ct. Rep. 165.

Where money is procured to be paid out upon fraudulent representation, the cause of action is presumed to have arisen, and the statute of limitations begins to run when the fraud was committed, *Barlow v. Arnold*, 6 Fed. Rep. 351; but such presumption may be avoided by alleging and proving the time of the discovery of the fraud. See *Carr v. Hilton*, 1 Curt. 390; *Field v. Wilson*, 6 B. Mon. 479; *Carneal v. Parker*, 7 J. J. Marsh. 455; *Baldwin v. Martin*, 3 Jones & S. 98; *Erickson v. Quinn*, 3 Lans. 302; *Mitf. & T. Eq. Pl.* 356; *Story, Eq. Pl.* § 754.

It has been held that the statute of limitations does not begin to run against an equitable action for relief, on the ground of fraud, until the aggrieved party has discovered the facts constituting the fraud, or has information of such a nature as would impress a reasonable man with the belief that a fraud had been committed, and would, upon diligent inquiry, lead to the discovery of the facts. *O'Dell v. Burnham*, (Wis.) 21 N. W. Rep. 635. See *Carr v. Hilton*, 1 Curt. 390; *Kennedy v. Green*, 3 Mylne & K. 699; *Hovenden v. Lord Annesley*, 2 Schoales & L. 607; *Martin v. Smith*, 1 Dill. C. C. 85; *Bailey v. Glover*, 21 Wall. 342; *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. 435; *Rice v. Burt*, 4 Cush. 208; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *App v. Dreisbach*, 2 Rawle, 287; *Reeves v. Dougherty*, 7 Yerg. 222; *Haynie v. Hall*, 5 Humph. 290; *Kuhn's Appeal*, 87 Pa. St. 100.

15. IMPLIED CONTRACT. Where a cause of action is based on an implied contract, the statute does not begin to run until after the circumstances from which the obligation is inferred arose. *Goodnow v. Stryker*, (Wis.) 14 N. W. Rep. 345.

16. JUDGMENT. Where suit is brought upon a judgment after a return of *nulla bona* upon the execution writ, the statute of limitations, it was held, commenced to run at the time of the return of the execution, and not the entry of the judgment. *Taylor v. Bowker*, 4 Sup. Ct. Rep. 397.

17. LEASEHOLD—ASSIGNMENT. In a suit between the assignor and assignee of a leasehold, for rent accruing, and paid by the assignor subsequent to the assignment, the statute of limitations begins to run in favor of the assignee from the time the assignor paid the accrued rent, and not from the time assignor made default in the payment of the same. *Ruppel v. Patterson*, 1 Fed. Rep. 220.

18. MARRIED WOMAN. Where the statute makes the wife as well as the husband liable for necessary family expenses, the liability of the wife continues as long as there is a right of action against the husband. *Frost v. Parker*, (Iowa,) 21 N. W. Rep. 507.

19. MINOR OR WARD—SUIT AFTER MAJORITY. The statute of limitations commences to run against an action by a ward to recover lands sold by his guardian at the time of ward's attaining majority. *Seward v. Didier*, (Neb.) 20 N. W. Rep. 12. See *Spencer v. Sheehan*, 19 Minn. 338, (Gil. 292); *Miller v. Sullivan*, 4 Dill. 340; *Good v. Norley*, 28 Iowa, 188, (overruled by *Boyles v. Boyles*, 37 Iowa, 592); *Holmes v. Beal*, 9 Cush. 223; *Norton v. Norton*, 5 Cush. 524; *Arnold v. Sabin*, 1 Cush. 525; *Howard v. Moore*, 2 Mich. 226; *Coon v. Fry*, 6 Mich. 506.

Where the party who should bring an action for the seduction of a minor is the person who seduces her, the statute of limitations will not begin to run until after such minor attains her majority. *Watson v. Watson*, (Mich.) 18 N. W. Rep. 605.

A party having a right to pursue her demand on attaining her majority cannot tack her subsequent disabilities by successive covertures, in order to prevent the operation of the statute of limitations. *Gaines v. Hammond's Adm'r*, 6 Fed. Rep. 449.

20. MORTGAGE. The statute of limitations commences to run against an action to foreclose a mortgage when the cause of action accrued. *Herdman v. Marshall*, (Neb.) 22 N. W. Rep. 690; *Cheney v. Cooper*, 14 Neb. 415; S. C. 16 N. W. Rep. 471.

21. NUISANCE. It has been held that the statute of limitations commences to run against an action for erecting and maintaining a nuisance by a gas company at the time of erection of the gas-works. *Baldwin v. Oskaloosa Gas-light Co.*, (Iowa,) 10 N. W. Rep. 317.

But the general doctrine is that in an action for damages and abatement of a nuisance the statute of limitations will not be considered to have begun to run until some injury has been caused by the alleged nuisance. *Miller v. Keokuk & D. M. Ry. Co.*, (Iowa,) 16 N. W. Rep. 567; *Powers v. Council Bluffs*, 45 Iowa, 652.

Every continuance of a nuisance is in law a new nuisance. *Ramsdale v. Foote*, (Iowa,) 13 N. W. Rep. 557. See *Baltimore & P. R. Co. v. Fifth Baptist Church*, 2 Sup. Ct. Rep. 719.

And where, in an action for damages, and to abate a nuisance, since the cause of action accrued, the statute of limitations has run, but damage has continued to be done within the time provided by statute, the action is not barred. *Drake v. Chicago, R. I. & P. R. Co.*, (Iowa,) 19 N. W. Rep. 215. See *McConnel v. Kibbe*, 29 Ill. 483; *Bowyer v. Cook*, 4 Man., G. & S. 236.

22. ON COMING INTO STATE. On removal to another state the statute of limitations commences to run, on a cause of action already accrued, from time of arrival in state. *Edgerton v. Wachter*, (Neb.) 4 N. W. Rep. 85; *Hartley v. Crawford*, (Neb.) 11 N. W. Rep. 729; *Harrison v. Union Nat Bank*, (Neb.) Id. 752.

23. ORDER OR WARRANT ON COUNTY TREASURY. The statute of limitations begins to run against a county warrant when it is presented to the proper authority, and indorsed "not paid for want of funds." *Carpenter v. District Tp. of Union*, (Iowa,) 12 N. W. Rep. 280.

Where a town clerk has duly paid an order, and is entitled to credit for it at his next settlement, the statute of limitations begins to run at the date of such settlement. *Dewey v. Lins*, (Iowa,) 10 N. W. Rep. 660. See *Prescott v. Gonser*, 34 Iowa, 175.

24. PARTNERSHIP—ACCOUNTING. In case of partnership each partner is entitled to an accounting upon dissolution, and statute will run from that date. *Near v. Lowe*, (Neb.) 13 N. W. Rep. 825; but it does not begin to run against a partnership until the dissolution thereof, or until a sufficient time has elapsed after a demand for an accounting and settlement. *Richards v. Grinnell*, (Iowa,) 18 N. W. Rep. 668.

25. PROMISE TO PAY, ETC. Where a cause of action, barred by the statute of limitations, is revived by written admission, that removes the bar; the statute runs anew from the date of the admission. *Bayliss v. Street*, (Iowa,) 2 N. W. Rep. 437.

From the time of the acknowledgment of a debt under circumstances that indicate a willingness or liability to pay the same, the statute of limitations begins to run. *Green v. Coos Bay Wagon Road Co.*, 23 Fed. Rep. 67.

Where a debtor promised to pay "as soon as able," the statute of limitations began to run as soon as he had pecuniary ability to pay; and the question of when that ability arose is for the jury. *Tebo v. Robinson*, (N. Y.) 2 N. E. Rep. 383.

26. RAPE. The statute of limitations commences to run against action for rape at time of its commission. *Van Der Haas v. Van Domselar*, (Iowa,) 10 N. W. Rep. 227. But see *supra*, 19.

27. REAL ESTATE—ADVERSE POSSESSION. Adverse possession of real estate, to set the statute of limitations running, must be open, notorious, continuous. *Mauldin v. Cox*, (Cal.) 7 Pac. Rep. 804.

Mere entry upon land is not sufficient, without open, adverse possession, to stop the running of the statute. *Donovan v. Bissell*, (Mich.) 19 N. W. Rep. 146.

Going upon wild land, digging, and hunting for a corner and boundary lines, driving cattle on the land, and employing a man to "break" in the following spring, are not such going into possession as will set the statute of limitations in operation so as to carry a title by virtue of adverse possession. *Brown v. Rose*, (Iowa,) 7 N. W. Rep. 153.

It does not commence to run in favor of an adverse possession of lands until after the issuance of the patent to such lands. *Ross v. Evans*, (Cal.) 4 Pac. Rep. 443.

It does not run against the owner of unoccupied lands until someone assumes to take adverse possession; and this rule applies as well to an assignee in bankruptcy, who, under the statute, (U. S. Rev. St. § 5057,) must bring suit within two years, as to the original owner. *Gray v. Jones*, 14 Fed. Rep. 83.

An action to set aside an assignment or conveyance of property made to hinder or delay creditors should ordinarily be brought within the same time after the right accrues as an action at law to recover possession of the same property. *Hickox v. Elliott*, 22 Fed. Rep. 13.

28. SALARY. The statute begins to run against an action to recover salary of a public officer from time of expiration of his term of office. *Griffin v. County of Clay*, (Iowa,) 19 N. W. Rep. 327.

Where an employee's wages are due at the end of each month, the statute of limitations begins to run against an action to recover them at the date when they should have been paid. *Butler v. Kirby*, (Wis.) 10 N. W. Rep. 373; *Davis v. Gorton*, 16 N. Y. 255; *Rider v. Union India R. Co.*, 5 Bosw. 85; *Turner v. Martin*, 4 Rob. 661; *Mims v. Sturtevant*, 18 Ala. 359; *Phillips v. Broadley*, 11 Jur. 264.

29. **TAX, ILLEGAL—MANDAMUS.** Statute of limitations begins to run against *mandamus* to compel the refunding of illegal tax from the time of the payment thereof. *Beecher v. Clay Co.*, (Iowa,) 2 N. W. Rep. 1037.

30. **TAX TITLE.** The statute of limitations does not begin to run in favor of the holder of a tax deed by merely recording the same. To avail himself of the benefits of the statute, his possession must be actual and adverse, and continued for the statutory period. *Baldwin v. Merriam*, (Neb.) 20 N. W. Rep. 250.

a. *Against Owner of Land.* The statute of limitations commences to run against defense to tax deed from date of sale. *Shawler v. Johnson*, (Iowa,) 3 N. W. Rep. 604. See *Clark v. Thompson*, 37 Iowa, 536.

In Wisconsin it is held that the fact that the tax deed issued is void does not prevent the running of the statute in favor of the holder. *Peck v. Comstock*, 6 Fed. Rep. 22. See *Edgerton v. Bird*, 6 Wis. 527; *Hill v. Kricke*, 11 Wis. 442; *Knox v. Cleveland*, 13 Wis. 245; *Lawrence v. Kenney*, 32 Wis. 281; *Wood v. Meyer*, 36 Wis. 308; *Marsh v. Supervisors*, 42 Wis. 502; *Philleo v. Hiles*, Id. 527; *Oconto Co. v. Jerrard*, 46 Wis. 324; *Milledge v. Coleman*, 47 Wis. 184; *S. C. 2 N. W. Rep. 77*.

b. *Against the Holder of Tax Deed.* The statute commences to run against one claiming under a tax deed from date of treasurer's deed, where received when entitled to demand the same, *Bailey v. Howard*, (Iowa,) 7 N. W. Rep. 592; *Barrett v. Love*, 48 Iowa, 103; otherwise, from time when entitled to deed and not from date of actual execution and delivery. *Hintrager v. Hennessy*, 46 Iowa, 600.

The statute commences to run against deed without date from day of its delivery, *McMichael v. Carlyle*, (Wis.) 10 N. W. Rep. 556; for the real date of a deed is the date of delivery, *Jackson v. Schoonmaker*, 2 Johns. 234; or from the date of filing same for record. *Griffith's Ex'r v. Carter*, (Iowa,) 19 N. W. Rep. 903; *Cassady v. Sapp*, (Iowa,) 19 N. W. Rep. 909; *Eldridge v. Kuehl*, 27 Iowa, 160. But the person purchasing at tax sale must demand and record his deed when he is entitled to do so. *Hintrager v. Hennessy*, 46 Iowa, 600.

c. *On Failure of Tax Title.* Where tax sale is set aside, or the title acquired fails, the purchaser has a lien for taxes paid, with interest, *Harber v. Sexton*, (Iowa,) 23 N. W. Rep. 635; which he may enforce by proceedings to foreclose the same, *Peot v. O'Brien*, 5 Neb. 360; *Pettit v. Black*, 8 Neb. 52; *Wilhelm v. Russell*, Id. 120; *Miller v. Hurford*, 11 Neb. 377; *S. C. 9 N. W. Rep. 477*; *Towle v. Holt*, 14 Neb. 222; *S. C. 15 N. W. Rep. 203*; *Reed v. Merriam*, 18 N. W. Rep. 137; *Zabradnicek v. Selby*, 19 N. W. Rep. 645; *Sturges v. Crowninshield*, 4 Wheat. 122; and the statute of limitations does not begin to run against the right to enforce such lien until the tax deed fails, *Schoenheit v. Nelson*, (Neb.) 20 N. W. Rep. 205; *Bryant v. Estabrook*, (Neb.) Id. 245; *Otoe Co. v. Brown*, (Neb.) Id. 274.

31. **TRUSTS.** It is a general rule that neither lapse of time, nor the rule of analogy, nor any defense analogous to the statute of limitations, can be set up by a trustee of an express trust. *Preston v. Walsh*, 10 Fed. Rep. 315; *Etting v. Marx's Ex'r*, 4 Fed. Rep. 673.

This rule applies only to pure or direct trusts. *Newsom v. Board of Com'rs*, (Ind.) 3 N. E. Rep. 163.

Yet, when the circumstances require it, especially when the rights of third persons intervene, a court of equity will enforce against the *cestui que trust* its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*. Id.

Hence, when the legal title to realty is in one person, and the real interest is in another, the statute of limitations will not run as between the parties until there is a renunciation of the trust, or until the party holding the legal title by some act or declaration asserts a claim adverse to the interests of the real owner. *Reihl v. Likowski*, (Kan.) 6 Pac. Rep. 886.

But where there is a conflict of claim between trustee and his *cestui que trust*, and the party having the legal estate holds adversely, the statute of limitations will protect the one having the legal title, and who is sought to be converted into a trustee by a decree founded upon fraud, breach of trust, or some inequitable advantage obtained by him. *Taylor v. Holmes*, 14 Fed. Rep. 498.

a. *Misappropriation, etc.* Where a person misappropriates trust funds, the statute commences to run from the actual misappropriation, or at furthest from the discovery of the fact by the use of reasonable diligence by the party entitled to its benefit. *Piereson v. McCurdy*, (N. Y.) 2 N. E. Rep. 615; *Same v. Same*, 33 Hun, 520.

It has been held that an action by a stockholder, suing in his own name for the benefit of all the stockholders, to recover against the directors of a corporation for property lost or stolen through the misconduct, negligence, carelessness, and inattention of such directors, is in the nature of complaint in an equitable action against the directors, as trustees,—one of which courts of equity have jurisdiction, *Brinkerhoff v. Bostwick*, (N. Y.) 1 N. E. Rep. 663; *Robinson v. Smith*, 3 Paige, 222; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; and the statute of limitations will

begin to run as in other cases of breach of corporate trust. See *Pierson v McCurdy*, *supra*.

b. Resultant, Constructive, Implied Trusts. The statute of limitations will run in favor of the trustee of a resultant or constructive trust from the time he disavows the obligations of the trust. *German-American Seminary v. Kiefer*, (Mich.) 4 N. W. Rep. 636; *Otto v. Schlapkahl*, (Iowa,) 10 N. W. Rep. 651; *Strimpfler v. Roberts*, 18 Pa. St. 283; *Gebhard v. Sattler*, 40 Iowa, 152; *Smith v. Davidson*, 40 Mich. 632.

Where a trust arises by implication out of the agreement of parties, and there is no conflict of claim, or adverse possession between the trustee and *cestui que trust*, statutes of limitation do not apply. *Taylor v. Holmes*, 14 Fed. Rep. 498.

32. VERBAL CONTRACT TO CONVEY. Where money has been paid on a verbal contract to convey land, the statute does not begin to run against an action to recover the same until the date of demand or refusal to convey. *Tucker v. Grover*, (Wis.) 19 N. W. Rep. 62; *Clark v. Davidson*, 53 Wis. 317; S. C. 10 N. W. Rep. 384. See *Thomas v. Sowards*, 25 Wis. 631; N. W. U. P. Co. v. Shaw, 37 Wis. 655.

33. WRONGFUL ACT. Where a wrongful act has been committed, in the absence of fraud the statute begins to run as soon as the wrong is committed, although the plaintiff may be ignorant that a cause of action has accrued. *Dee v. Hyland*, (Utah,) 3 Pac. Rep. 388; *Jordan v. Jordan*, 4 Greenl. 175; *Thomas v. White*, 3 Litt. 177; for the statute does not protect plaintiffs who are ignorant of the facts necessary to enable them to bring suits, unless that ignorance is occasioned by some improper conduct on the part of the defendant. *Froley v. Jones*, 52 Mo. 64; *Wells v. Halpin*, 59 Mo. 92.

Failure to credit a payment on a judgment is not a fraud, and the statute of limitations begins to run from the date of the payment. *Shreves v. Leonard*, (Iowa,) 8 N. W. Rep. 749. See *Gebhard v. Sattler*, 40 Iowa, 153; *Brown v. Brown*, 44 Iowa, 349; *Phoenix Ins. Co. v. Dankwardt*, 47 Iowa, 432; *Higgins v. Mendenhall*, 61 Iowa, 135.

UNITED STATES v. CHASE.

(Circuit Court, D. Massachusetts. June 30, 1886.)

1. CRIMINAL LAW—INDICTMENT—MOTION IN ARREST OF JUDGMENT—SECTION 1025, REV. ST.

Under section 1025, Rev. St., a technical defect in an indictment, not tending to the prejudice of the defendant, affords no ground for a motion in arrest of judgment after a plea of guilty.

2. POST-OFFICE—OBSCENE MATTER IN MAILS—TAKING FROM MAILS—DEPOSITING SAME.

The clause in the act of congress of July 12, 1876, "for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same," applies only to the offense of taking an obscene publication from the mails, and not to that of depositing one in them.

Chas. Almy, Jr., Asst. U. S. Atty., for the United States.

Warren O. Kyle, for defendant.

Before GRAY and COLT, JJ.

GRAY, Justice. This is an indictment on the act of July 12, 1876, c. 186, (19 St. 90.) The first two objections taken to it are that the letter alleged to have been deposited in the mail is imperfectly described; and that the allegation that the defendant knowingly deposited an obscene, lewd, and lascivious letter is defective, because, construed by the technical rules of criminal pleading, the averment is only that the defendant knowingly deposited the letter, and not that he knew its character. The first objection is supported by the

decision in *Com. v. Wright*, 139 Mass. 382, S. C. 1 N. E. Rep. 411, and the second by the decision in *Com. v. Boynton*, 12 Cush. 499. But both these objections relate to defects or imperfections in matter of form only, not tending to the prejudice of the defendant, and therefore, under section 1025 of the Revised Statutes, affording no ground for a motion in arrest of judgment after a plea of guilty.

The third ground of the motion in arrest of judgment cannot be maintained. The clause in the act of 1876, "for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same," applies only to the offense of taking an obscene publication from the mails, and not to that of depositing one in them. This construction is sufficiently manifest on the face of this act, and is confirmed by comparison with section 3893 of the Revised Statutes, of which it is an amendment and enlargement.

The fourth and fifth reasons assigned for the motion in arrest present a more difficult question, which is, in effect, whether the act of 1876, enumerating "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character," "and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed," includes an obscene letter inclosed in an envelope or wrapper bearing nothing but the name and address of the person to whom the letter is written. The decisions in other circuits are conflicting. *U. S. v. Loftis*, 8 Sawy. 194; S. C. 12 Fed. Rep. 671; *U. S. v. Gaylord*, 11 Biss. 438; S. C. 17 Fed. Rep. 438; *U. S. v. Morris*, 9 Sawy. 439; S. C. 18 Fed. Rep. 900; *U. S. v. Comerford*, 25 Fed. Rep. 902. We are divided in opinion upon this question, and therefore, according to the usage of this court, deliver no opinion upon it, but, at the request of counsel for the United States, order it to be certified to the supreme court.

SHENFIELD v. NASHAWANNUCK MANUF'G Co. and others.¹

(Circuit Court, S. D. New York. June 15, 1886.)

1. PATENTS FOR INVENTIONS—PATENTABILITY—INVENTION.

To make a suspender end of flat cord, in substantially the same way that suspender ends of round cord had been made, and in substantially the same way in which flat button ends had been made, for the purpose of fastening or securing other articles of wearing apparel than trousers, is an exercise of the ordinary skill of the housewife or the seamstress.

2. SAME—SUSPENDER ENDS.

Letters patent No. 169,855, of November 9, 1875, to Abraham Shenfield, for an improvement in suspender button-straps, are void for want of patentable novelty.

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

In Equity.

E. N. Dickerson and E. N. Dickerson, Jr., for plaintiff.

Edmund Wetmore and Wm. A. Jenner, for defendants.

SHIPMAN, J. This is a bill in equity to restrain the defendants from the infringement of letters patent No. 169,855, dated November 9, 1875, to the plaintiff, for an improvement in suspender button-straps. The nature and extent of the alleged improvement upon the pre-existing cut art described by the patentee in his specification, as follows:

"Suspender ends have been made of leather, felt, jean, and similar material, with the button-hole cut in the same, and in most instances the materials have been pasted together, in addition to lines of stitching surrounding the button-hole. Suspender ends have also been made of a round cord, with the ends turned back and fastened to form loops; but this round cord is objectionable, as it does not lie flat against the person or beneath the buttons. I make use of a suspender end made of a double flattened cord or strip, bent around into a loop, and united together, leaving sufficient of the loop open to form the button-hole. At the other end the suspender end is united to a buckle or clasp by a loop, or folded piece of leather, or other material, stitched to the suspender end. * * * The cord or strip of flat material is composed of silk, linen, cotton, worsted, or other suitable threads, or a mixture of two or more, and the threads are woven, braided, knitted, crocheted, or otherwise laid up into the form of a complete flat cord or strip, and when the strip is folded to form the button-hole loop, the seam at 3 may be made by sewing, knitting, crocheting, or otherwise; or the knitting or crocheting is commenced at the central line, 3, and extended at both sides thereof, and around the bottom-hole, by the successive ranges of interlocked loops."

The claim is for "the suspender end, made of a flat cord or strip of fibrous material, bent into a loop, laid flatwise, united at the inner edges, 3, and connected to the attaching pieces, *d*, as set forth."

It is stipulated by the respective counsel as follows:

"Complainant hereby admits that prior to the year 1870 there had frequently been publicly used, in the manufacture and wearing of cloaks and jackets, button-loops formed of flat braid, bent edgewise upon itself, and sewed together at the meeting edges, leaving an opening for the button-hole at the bend; that the ends of the braid in such button-loops were permanently attached to a button, or like device, which was affixed to one side of the body of the garment; and that the button-loop held the garment together by being buttoned onto a button, or like device, sewed to the other side of the garment; and that, when in use, the braid forming the button-loop rested under the button; and that such braids were made by machinery."

It thus appears that while suspender straps had been made of a round cord, with the ends turned back and fastened to form loops, the patented improvement consists of a cord or strip of any fibrous material, which is made flat in any way, bent into a loop, and united at the inner edges, and connected in the ordinary way with the buckle by a folded piece of leather or other material; and it further appears that button loops, to fasten the two sides of a cloak or jacket together, had been made in the same way, except that one end was permanently attached to a button or like device.

Whether the suspender end is, as it is called by the defendant, a double use of a well-known cloak loop, or is, as it is said to be by the plaintiff, an improvement upon a suspender end made of round cord, it equally seems to me that the improvement is devoid of invention. *Shenfield v. Schirmer*, 21 Fed. Rep. 241. To make a suspender end of flat cord in substantially the same way that suspender ends of round cord had been made, and in substantially the same way in which flat button ends had been made, for the purpose of fastening or securing other articles of wearing apparel than trousers, is an exercise of the ordinary skill of the housewife or the seamstress. The connection of the end to the attaching piece gives no patentable character to the loop. The attachment to the buckle is made in a customary, well-known way.

As the improvement, by whomsoever made, was not "new," in a patentable sense, it is unnecessary to examine the earnestly disputed question of priority of use.

The bill is dismissed.

TROY LAUNDRY MACHINERY Co. and others v. BUNNELL.¹

(Circuit Court, N. D. New York. June 24, 1886.)

1. PATENTS FOR INVENTIONS—INVENTION—ADAPTATION OF OLD DEVICES.

It may involve invention to make changes or modifications in parts which were substantially old, in order so to combine them as to effect their efficient co-operation.

2. SAME—PATENT FOR IMPROVEMENTS MUST BE LIMITED TO SAME.

Where the invention consists in changes or modifications of old elements in order so to combine them as to effect their efficient co-operation, the claims of the patent must be carefully limited, either by express terms or by fair construction, to the precise improvements made.

3. SAME—COMBINATION, WHEN NOT INVENTION.

It is not invention merely to bring old devices into such juxtaposition as will allow each to work out its own effect, without contributing any new function or mode of operation.

4. SAME—No. 258,334, MACHINERY FOR FOLDING AND CURLING COLLARS, VOID.

Letters patent No. 258,334, of May 23, 1882, to Thomas S. Wyles, for machinery for folding and curling collars, *held* void for want of patentable novelty, in view of patents No. 57,308 and No. 173,096, and the "Churchill Machines," which were in common use as early as 1870.

In Equity.

Wm. H. King, for complainant.

Ward & Cameron, for defendant.

WALLACE, J. The complainants allege infringement of letters patent No. 258,334, granted to Thomas S. Wyles, May 23, 1882, for machinery for folding and curling collars. The defendant, besides

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

denying infringement, relies upon the want of novelty in the patented invention. The object of the invention is to dispense with the hand labor of folding and curling linen or cotton collars after they have been starched and partially folded, and to substitute mechanism by which starched and partially ironed collars, having the curved fold-line moistened, can be accurately folded, curled, and dried progressively, from end to end. The machine described in the specification consists of a feeding guide, E, two rollers, B and C, and a curling guide, G. The feeding guide serves to introduce and direct a partially folded collar between the two rollers. The rollers are supported, rotated, and pressed together by any suitable means. The roller, B, is of much greater diameter than the roller, C. The collar feeding surface of the roller, B, is made elastic, a tight layer of felt covered with muslin being commonly used to give it this quality. The roller, C, is of metal, with a hard, smooth surface, and is adapted to be artificially heated. The curling guide is concavely curved, with its concaved surface in the form of a section of a hollow cone. In operation, the collar, partly folded, and having the curved fold-line moistened, is placed in the feeding guide, E, which is inclined to the plane of contact between the two rollers; is introduced by the feeding guide between the rollers; and by their action is pressed and dried, retaining a curved shape, until it issues from between them into the curling guide, G; and is directed in a spiral course, by the form of the curling guide, away from the point where it enters, from between the rollers, and discharged in a curved shape.

The patentee refers in his description to two prior patented machines, as follows:

"United States patent No. 57,308 shows and describes a machine for moulding, turning, or flaring outward the fold portion of a folded paper collar, by the combination and arrangement of a concave roller, a convex roller, a guide to direct the folded collar between the rollers, and bend it towards the concave roller, and another guide to receive, bend, and direct the collar as it issues from between the rollers; but that patent does not show, describe, or mention any roller having an elastic, yielding, or cloth-covered surface, nor any means whatever for heating one of the rollers. Consequently that machine was not capable of folding, drying, and curling a partly-folded starched and ironed collar, having a moistened fold-line; and that particular combination and arrangement of the two guides of the concave and convex rollers would not produce the plain fold required in starched and ironed collars having curved fold-lines. United States patent No. 173,096 shows and describes a plain clothed roller, combined with a plain hard roller of less diameter than the clothed roller, and means for supporting and rotating the rollers, pressing one against the other by a yielding force, and heating the hard roller, but without any folding and curling guides; so that that machine could not accurately fold and curl partly-folded, starched, and ironed collars, having curved lines of fold."

The claims of the patent are as follows:

"(1) The combination with the rollers, B, C, of the folding guide, E, and the curling guide, G, in the form of a section of the inner surface of a hollow cone, and arranged in respect to said rollers and folding guide substan-

tially as described. (2) The combination with the roller, B, having a covering of cloth, hard roller, C, and means, substantially as set forth, for heating said hard roller, of the folding guide, E, and curling guide, G, both arranged in respect to said rollers with each other, substantially as described."

The proofs show that machines for folding paper collars, known as the "Churchill Machine," had been in public and extensive use as early as 1870, which embodied the parts of the combination of the patented machine, except that neither of the rollers was elastic, or was adapted to be artificially heated. This machine was a modification of that described in letters patent No. 57,308, referred to in the specification of the complainants' patent.

Letters patent granted May 31, 1881, to Richard H. Gardner and John W. Gardner, and March 8, 1881, to James G. Crawford, have also been put in evidence by the defendant as anticipations of the complainants' patent. The first of these patents describes a machine known as the "Gardner Collar-shaper," which combines a metallic roller with a larger elastic roller, but has no feeding or curling guide, and neither roller is adapted to be heated. The second of these patents describes a machine for folding and shaping collars and cuffs, which combines a feeding device with three rollers, two of which are designed to be elastic, and the other a hard roller, artificially heated. This patent does not contain a hint of a curling guide. The defendant has attempted to show that a curling guide was used with machines constructed under this patent, and that the machines, with the curling guides, were in public use prior to the date of the actual invention of Wyles; but the proofs fail to show this satisfactorily.

All the machines thus described in prior patents, or shown to have been in public use prior to the invention of Wyles, differ in details of construction from the machine of the complainant's patent; and none of them embody the identical combination of either claim of the patent, except the Churchill machine. That machine contains the combination of the first claim, in which an elastic roller, or a roller having a covering of cloth, is not an element. Although no one of the prior patents or machines is sufficient alone to negative the novelty of the second claim, considered together, and in connection with the machines referred to in the specifications of the patent, as illustrating the prior state of the art, they are sufficient to defeat this claim, and authorize the conclusion that the combination did not involve invention. What Wyles really did was to combine the parts of the inventions described in patents No. 57,308 and No. 173,096 into one machine, making the necessary modifications in detail of construction and arrangement to insure their efficient co-operation. He selected the plain clothed roller, and plain hard roller, adapted to be heated, of patent No. 173,096, and combined with them the feeding guide and curling guide of patent No. 57,308, introducing such changes in the form of the guides as had previously

been made and used in the Churchill machine, and in the form and material of the rollers as had been shown in the machine of the patent to the Gardners. In the machine of the patent the two rollers perform the same functions, and have the same mode of operation, as those in the machine of the patent No. 173,096, while the feeding guide and curling guide perform the same functions, and have the same mode of operation, as those in the machines of patent No. 57,308, and in the Churchill machine.

It is not invention merely to bring old devices into such juxtaposition as will allow each to work out its own effect, without contributing any new function or mode of operation to the other. This is all that has been done in the machine of the patent. It may involve invention to make changes or modification in parts which were substantially old, in order so to combine them as to affect their efficient co-operation. Where such changes constitute the invention, the claims of the patent must be carefully limited, either by express terms or by fair construction, to the precise improvement which is the subject of the invention. An attempt has been made to do this in the present patent by making a curling guide of a peculiar form a constituent of the first claim, and a roller having a covering of cloth, or what is substantially an elastic roller, a constituent of the second claim. As has been stated, neither of these constituents are new as modifications of old parts which had been applied to the same use.

The bill is therefore dismissed.

THE BAY QUEEN.

NEW JERSEY STEAM TRANSP. CO. v. THE BAY QUEEN, etc.

(*District Court, S. D. New York.* April 12, 1886.)

1. COLLISION—OVERTAKING VESSEL—RIVAL BOATS.

An overtaking steamer must keep out of the way of the one ahead. It is no defense that the latter had not acquired full speed.

2. SAME—ROUNDING POINTS—SIGNAL WHISTLES, MEANING OF—CROWDING—STATE STATUTES.

When two steamers, bound around a point, and approaching it from the same side, upon courses somewhat crossing, signal to each other, the one giving two whistles, and the other replying with one whistle, such signals mean that the former will starboard her wheel and keep to the left, and that the latter will port her wheel and keep to the right, so far as is reasonably necessary to pass the common point. The outside vessel, in such a case, is bound to keep away enough not to crowd the other; 20 yards being required by the state law.

3. SAME—CASE STATED—RECKLESS NAVIGATION.

The rival passenger boats B. Q. and D. R. M. left their docks in the Kills, Staten island, at about the same time; both being bound around Long Dock, and between that and a schooner which lay at anchor 400 or 500 feet to the westward and outside of it. The D. R. M. signaled by two blasts of the

whistle; the B. Q. replied by one; the former being then under full speed, but considerably further from the Long Dock than the B. Q., which was under half speed. There was sufficient room for both to pass at the same time between the schooner and Long Dock. When nearly abreast of it, the B. Q.'s stem struck the wheel-house of the D. R. M., doing the latter some damage, but the latter kept on without pause. *Held*, discrediting much of the testimony of the D. R. M., that she was, at the time of the signals, considerably astern of the B. Q.; that she was an "overtaking" boat; and that, as such, as well as by reason of having the B. Q. on her own starboard hand, she was bound to keep out of the way of the latter; that by her signal of two whistles, also, she was bound to keep to the left; that she did not do so to the extent easily within her power, but crowded upon the B. Q.'s course; that she was navigated recklessly, if not with the intention, even, of running down the B. Q., or forcing her upon the dock. *Held, further*, that upon the signals given, the B. Q. could not have anticipated such navigation on the part of the D. R. M.; and having proceeded slowly, and gone as near the Long Dock as was safe, and reversed shortly before the collision, she was without fault, and the damage should be borne by the D. R. M. alone.

In Admiralty.

Wilcox, Adams & Macklin, for libellant.

Stewart & Boardman and Geo. L. Nichols, for claimants.

Brown, J. At about a quarter past 2 in the afternoon of August 13, 1885, the rival passenger boats the Bay Queen and the D. R. Martin, running from Staten island to New York, came into collision in the Kills, at Port Richmond, very near the end of Starin's Long Dock; the port bow of the Bay Queen striking the Martin just forward of her wheel-house. Both boats were upon their regular trips. The time of each for leaving her dock at Port Richmond was 2:10, and the boats left nearly upon time. The Kills run there very nearly east and west. The Long Dock extends about 400 feet from the shore. The Bay Queen's dock was only a short dock, distant from 400 to 600 feet to the westward of the Long Dock; the Martin's dock was about 1,000 feet further westward. Both boats were accustomed to pass near the end of the Long Dock. At this time there was a schooner lying at anchor from 400 to 500 feet to the westward of the end of the Long Dock, and a little further out in the stream. The tide was about half ebb, running to the eastward. The schooner lay somewhat quartering, and tailing to the south-east. The ordinary course for both steamers was to pass between the schooner and the Long Dock; and the witnesses on both sides prove that there was plenty of room for both to pass between the schooner and the dock, at the same time. The full speed of the two boats was about the same; but the Martin could be more quickly handled. At the time of the collision she was going under full speed, from 10 to 12 knots. The Bay Queen had stopped her engine before the collision, and had at no time reached full speed. The distance from the Bay Queen's dock to the end of Long Dock was not over six or seven hundred feet, less than half the distance from the Martin's dock to the end of Long Dock. The Martin, in shaping her course to pass Long Dock, went about 250 feet outside of the end of the Bay Queen's dock. The

Bay Queen's dock was so near to Long Dock that the Bay Queen was obliged to start out under a hard a-starboard wheel, and keep her wheel to starboard until she got far enough out to be able to clear the Long Dock; and then, when near the end of the dock, she would straighten down to the eastward. Until she approached the end of the Long Dock she was subject to the eddy, which was somewhat against her on the ebb, while the Martin, from opposite the Bay Queen's dock, had little or none of the eddy against her.

The circumstances just stated render it impossible that the collision could have occurred, if the testimony of various of the libellant's witnesses were true; namely, that at the time the Bay Queen started from her dock the D. R. Martin was abreast, or nearly abreast, of the Bay Queen. The full speed at which the Martin was running, her shorter distance from the end of Long Dock, and the less eddy to pass through, would, if that testimony had been true, have brought the Martin several lengths ahead of the Bay Queen at the time the latter reached Long Dock. I am obliged to hold all this testimony, therefore, as a gross misrepresentation of the facts. The same circumstances, above stated, agree with the clear preponderance of the other testimony, that when the Bay Queen left her dock, the Martin was several lengths to the westward. The weather was fine; both were in full view of each other; and each knew the course and intention of the other. Upon the above facts the fault of the Martin is clear.

1. The Martin was plainly the overtaking boat; and, as such, she was bound to keep out of the way of the vessel ahead. Her speed at that time being considerably greater than the Bay Queen's, there is no doubt that the Martin did not actually lap the stern of the Bay Queen until a very short time before the collision. During all the time before that, she was clearly in the position of an overtaking boat, and had abundant time and room to keep out of the way, either by slackening speed, or by stopping, or by going to the northward. It is no defense that the Bay Queen had not acquired her full speed.

Again, she had the Bay Queen, from the first, on her own starboard hand, and on that ground she was also bound to keep out of the way. Considerable testimony was given on her part to the effect that she could not stop. I must consider that the merest pretext, and as untrustworthy as her testimony that she was not an overtaking boat. There was not in fact any need of stopping. She had only to keep to the northward after passing the schooner, and she would have been out of the way of the Bay Queen, and given the latter all the room she required to pass the Long Dock. I am satisfied from the evidence that the collision took place within less than 100 feet of the north-west corner of Long Dock. The Bay Queen was not yet perfectly straightened down the river, and she was so near the Long Dock that her stern concealed the end of the dock from the view of persons standing on the Bay Queen's dock. I find, therefore, that the Martin violated the state statute, which for-

bade her, as the overtaking boat, to go within 20 yards of the Bay Queen, (1 Rev. St. p. *684, § 7;) and she violated a further rule of navigation which forbade her passing so as to crowd upon the proper course of the vessel passed. As above stated, there was abundant room to the northward, and nothing to prevent the Martin, upon passing the stern of the schooner, from keeping away to the northward, giving to the Bay Queen sufficient space along the end of the dock.

2. I think no part of this loss can be charged upon the Bay Queen. The disregard of the various rules of navigation above indicated, on the part of the Martin, was so manifest and persistent as hardly to be deemed less than deliberate and reckless. The boats had repeatedly exchanged signals; the Martin giving two blasts, meaning that she would keep away to port. She might have done so, and have avoided the collision, but did not. The Bay Queen had the right of way. She had no reason to anticipate that the Martin, after passing the schooner, would not keep to the northward under a starboard helm, as her two whistles had repeatedly promised. The Bay Queen continued to go at slow speed, and just before the collision she stopped her engines; while the Martin ported her wheel, which tended to bring her across the Bay Queen's bows. The Martin's officers state that the wheel was ported but a few seconds before the collision, and was designed to throw her stern off, and ease the blow. Other witnesses state that the wheel was ported earlier, and that her course was actually changed so as to throw herself across the Bay Queen's bows. No reliance can be placed on the asserted intentions of the Martin's pilot to ease the blow, or to avoid the collision. Had any *bona fide* intention existed to avoid collision, or to yield the Bay Queen her rights, it is incredible that he would not have gone to the northward, under a starboard wheel, and have slowed her engines before the boats lapped each other. There is no small ground for suspicion that the Martin was handled with the deliberate purpose of running down the Bay Queen, or else forcing her upon the end of the pier, which, her witnesses say, would have been the result had she undertaken to back. The subsequent conduct of the Martin in continuing on at full speed, notwithstanding the collision, is in keeping with her previous management. Her whole navigation was so extraordinary that it could not have been anticipated by the Bay Queen; and I find that the latter, therefore, did all that was reasonably incumbent upon her to avoid the collision; and that the loss rightly falls upon the Martin, and that the libel should be dismissed, with costs.

WINN v. GILMER.

(Circuit Court, W. D. Texas. 1886.)

1. REMOVAL OF CAUSE—JURISDICTION—CITIZENSHIP.

The citizenship of a party moving from one state into another is controlled by the intention in that regard with which he takes up his residence in the new place.

2. SAME—REMOVAL FROM STATE—INTENTION.

A party who has moved from one state into another cannot avail himself of the jurisdiction of a federal court upon the claim of being a non-resident, after showing by his acts and declarations, before the litigation commenced, an intention of becoming a citizen in his new place of abode.

Suit for Debt.

Leo. Tarleton, for plaintiff.

Houston Bros., for defendant.

TURNER, J. "Citizenship," as used in the law under consideration, means residence with intention of remaining permanently at that place. A man may reside in a state for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a state different from that where he formerly was domiciled or was a citizen, with intent and purpose of making the new place of residence his future permanent home, that moment he loses his former domicile, and becomes domiciled in the new place; or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the state of his adoption.

The question for me to decide is whether Mr. Winn, the plaintiff, and his assignor, from whom he claims a part of his alleged right of action at the time this suit was instituted, were citizens of Texas. I put the question this way, because, if not citizens of Texas at that time, it will be conceded that this suit may be properly prosecuted here.

The query raises two questions of fact:

First. Where did these parties reside at the time this suit was brought? As a simple question of residence, it may be safely said, in San Antonio. Both these parties were single men, leading a sort of nomadic life, but for the last two or three years the evidence indicated very clearly that San Antonio was headquarters, and the place of residence, for business purposes, or for choice or pleasure, it matters not, for the purpose of this decision.

Second question is, was that residence coupled with an intention to permanently remain here? From the nature of the case, no person can judge of the secret intentions dwelling in the minds of other men. The resolutions, intentions, and desires of the mind are made manifest by acts which often reveal the inward intention as clearly as it would be if the mind of another was so constructed that it could

be opened and read as we read from a printed volume. To illustrate: Suppose a man should approach, and deliberately draw a pistol, and discharge it at the person he was approaching, and should kill him by so doing, we would all say that the act was but the execution of a resolution or determination of the mind in the slayer to do great bodily injury to the person slain, and no declaration of innocent intention, however strongly asserted, would convince the observer that the act was other than willful, and done in order to carry out a previously formed design. A man throws into the sea an article of value; we know he intended to part with its possession forever.

I have given these strong and abstractly convincing acts to illustrate why it is that we may properly judge of men's intentions by their acts, when not accompanied with declarations; and sometimes we would conclude that the act spoke louder than the declaration, if they were inconsistent with each other. Hence arises the familiar saying that "actions speak louder than words."

The question for me to decide, from all the facts and circumstances revealed by the evidence, is whether, after carefully weighing all the evidence, the citizenship of the plaintiff is such as authorized him to bring this suit in this court. The wisdom displayed in permitting a citizen of another state to sue a defendant who resides in this state has never been doubted, and that right should be carefully guarded and protected, whenever the citizenship is of different states. We know, from observation and experience, that association begets friendship, and friendship begets favoritism and bias in favor of those of whom we think kindly; and a stranger, who should come into a community, and sue a man of good standing, and be compelled to take a jury from the friends and acquaintances of the defendant, would, without any intention on the part of the jury, certainly have to contend against the bias which unconsciously, but inevitably, springs from friendly association. Hence the justice of the law which has created a forum where non-residents can litigate their legal rights; where juries are obtained from widely-separated communities, and therefore not likely to be influenced by any other desire than to administer the law. While this is true, it is none the less true that the right to be tried by one's own peers, and to litigate his rights in the courts of his state, is a right and privilege none the less valuable, and, perhaps, we may safely say more satisfactory to the defeated party than would otherwise be the case.

When a young man leaves the parental home, and strikes out into the world; goes to another state; engages in business for a considerable length of time,—the natural inference would be that he intended to build himself up a new home, and domicile in the state where he had taken up his residence. So, likewise, if a man of years, overtaken by misfortune,—perhaps reduced from luxury to penury and want,—with no family ties to bind him, and the home of former years has passed from him, and from under his control, in the desperation of

his situation abandons the state where these misfortunes have overtaken him, and remains away for a term of years,—enters into the business of life with a residence in a neighboring state,—the inference would naturally arise that he had no desire or intention of longer remaining in the locality of all his misfortunes.

Thus much, I think, may safely be said with reference to what would be the natural inference from acts referred to, and these facts are made to appear by the plaintiff's evidence. The evidence of the defendant (which is not disputed) is that plaintiff, at the dinner-table of defendant, declared his intention to support Mr. Cleveland, and the defendant declared his intention to vote for Mr. Blaine; whereupon plaintiff announced his intention to kill his vote, which was understood to mean, and according to the common use of that expression did mean, that the plaintiff intended to vote for the candidate of his choice. That the conversation was had, there can be no doubt. This declaration, together with the further declaration that he expected to remain upon and run the ranch, certainly justified the defendant in concluding that the plaintiff had become a citizen of the state. Had it been shown that the plaintiff had exercised the privilege of voting, it would have been conclusive evidence of his having adopted this state as his domicile, and he would not be heard to dispute it, as the law regards that act as conclusive evidence of intention.

It is in evidence, as I have stated, that he said he would vote. It is in evidence, however, that he did not; and it is in evidence that he said he could not vote because not a citizen. The assertion that he would vote (for I hold the declaration in evidence is equivalent to that) is just as persuasive as the declaration that he would and could not, so far as mere declaration is concerned.

The question then arises, is there any reason why one should have more influence in determining upon the weight of this evidence than the other? At the time of the declaration that he would vote, good feeling existed, and no reason can well be assigned for any motive to make such a statement other than to give utterance to a formed design; and the same may be said with reference to the declaration about residing upon and running the ranch in Texas; and if, in fact, the design was formed to become a citizen of Texas at any period during his residence here, he became *ipso facto* a citizen of the state of Texas, (he being a native of this country,) and any subsequent change of purpose would not restore former citizenship in another state, so long as he continued to reside here. On the other hand, it may be fairly inferred from the evidence that the declaration of not voting because not a citizen was made after the possibility of a suit was made evident, and in that case, if it was regarded as any benefit to sue in this court, then there was a motive in the latter declaration, where none can be assigned for making the former declaration of intention to vote against the vote (or to kill the vote) of defend-

ant. This being so, it follows that, in weighing the evidence, the declaration made when no motive for a misstatement is shown, should outweigh the other one, where a reason can be assigned for making a different statement.

It is but recently that men who are interested in a cause are permitted to testify in the case. The old rule resulted from a knowledge of human weakness, where one's own interests are involved. While a different rule now prevails, human nature has not changed, and if in weighing evidence, and especially where there is a conflict, we forget what self-interest has to do with human action, we come short of duty. I do not wish to be understood by these remarks as reflecting upon the statement of any witness, because nothing has been said or done that would lead to the conclusion of intentional misstatement, but to show the reasons why one statement may properly claim preference over another, made under different circumstances, by the same person, where influenced and controlled by different motives.

The question, then, arises, shall a person so act and make declarations that justify the belief in the minds of those who deal with him that a certain fact exists, and when it suits his interest or convenience assert the contrary? I do not wish to be understood as asserting in this case that the doctrine of estoppel applies, because the defendant has done no act prejudicial to his interest, based upon what plaintiff has said or done. But I do mean to say that a man ought not to so act as to justify the belief that a certain condition of things exists, and then, when it becomes to his interest to declare a different state of facts to exist, and the question presented is rendered extremely doubtful, that he ought not to have the benefit of that doubt.

The evidence of Mr. Curiton, plaintiff's assignor, is not that he ever intended to return to *Alabama* to live. It is true he said he thought he was a citizen of *Alabama*, if he was a citizen anywhere. This was but an opinion, and the evidence fails to satisfy me that he had not ceased to be a citizen of *Alabama*.

In conclusion, I may say that acts and declarations of any person, in his own interest, after a controversy has arisen, are received with disfavor. Yet, under the law, a man may be a witness in his own case; but with this privilege comes the duty to those who weigh evidence to discriminate between such evidence as may properly have weight and such as, by the rules of law, should not. In this case, if I have reached a wrong conclusion,—which I do not believe,—the plaintiff must rest satisfied, because his own conduct and declarations, tending to show citizenship here before any suit was anticipated, have misled me, which acts and declarations I feel in duty bound to hold binding, although those of later date are different. Cause dismissed.

NASHUA & L. R. Co. v. BOSTON & L. R. Co. and others.

(Circuit Court, D. Massachusetts. May 5, 1886.)

1. RAILROAD COMPANIES—POWERS OF DIRECTORS—CONTRACT FOR JOINT MANAGEMENT.

Two railroads entered into a contract for the joint management of their lines, including certain railroads leased to them. The contract fixed the proportion of the net earnings to be drawn by each of the contracting parties. In pursuance of the agreement, the directors of the plaintiff company authorized the deduction from the net earnings of interest on the cost of a new depot built by the defendant company for the accommodation of the joint traffic. It was also agreed by the respective boards of directors that the defendant company should purchase a controlling interest in two roads leased to them, and managed under the joint contract, and that during the continuance of the joint contract, the excess of interest upon the purchase money, over the amount of dividends earned upon the stock, should be borne in proportion to their shares of the net earnings. *Held* that, under the circumstances, the directors of the plaintiff company had acted within their powers, and that the plaintiffs could not claim payment of the sums so expended.

2. SAME—DIRECTORS' CONSENT—EVIDENCE.

Where other circumstances prove the directors' consent, it is not necessary, to bind the corporation, that their records should disclose a formal vote of the directors.

In Equity.

B. F. Brooks, for complainant.

A. A. Strout and J. H. Benton, Jr., for defendant.

COLT, J. This bill in equity relates to certain transactions growing out of a joint traffic contract entered into between the plaintiff and defendant corporations. The original contract was for three years, and was dated January 29, 1857. By a supplemental contract dated October 1, 1858, the parties agreed to an extension for 20 years. The corporations entered into this contract for the promotion of their mutual interests through a more efficient and economical joint operation and management of their respective roads, and for the better security of their respective investments, as well as for the convenience and interest of the public. By the terms of the contract, the parties agreed to surrender to the joint management the entire control of their roads, shops, depots, and other property, reserving only such property as was afterwards specified in the contract. The parties assumed the joint expenses of operating the roads, and the expenses incident to the working of the Wilton and Stony Brook Railroads connected with the Nashua & Lowell Railroad; also, by supplemental agreement, the parties assumed the contracts existing between the Boston & Lowell and Salem & Lowell and Lowell & Lawrence Railroad Companies. They also assumed the contract existing between the Nashua & Lowell Railroad and the Northern Railroad Company. They also provided that all contracts for the transportation of property or persons heretofore made by either party should be assumed and carried out by the

joint parties, and that all separate contracts necessary for the ordinary operation of the roads, then made by either party, should be assumed by the joint parties, and the expenses paid from the joint funds. The roads were to be managed by one agent, who should be chosen by the combined vote of a majority of the directors of each party. The income and expense accounts of the joint roads were to be made up by estimate at the close of each month, and the net balance divided upon the basis agreed upon, subject to a final adjustment at the closing of accounts. It was further agreed that "on the first day of April and October in each year the said accounts shall be accurately closed and balanced by settlement with each party, and adjusting all previous payments and accounts;" the Boston & Lowell Railroad Company receiving as its portion 69 per cent., and Nashua & Lowell Railroad Company 31 per cent., of the joint net income. It was further agreed that the indenture should be construed as a business contract solely, and in no sense a lease of one road to the other, or as a union of the corporate powers or privileges. All controversies arising under the contract, at the request of either party, were to be submitted to arbitrators.

After the roads began operation under the joint contract, large additions of mileage were made. The Stoneham Branch was purchased by the Boston & Lowell, and the Peterboro' Railroad was leased by the Nashua & Lowell. The Lexington & Arlington was purchased, and the Middlesex leased, by the Boston & Lowell. In the proper and legitimate development of the roads, it became necessary to form connections with the upper roads, so called, which connected with the the vast country lying to the north and west. The main outlet for this whole line of transportation was Boston. In order to retain the increasing business, as well as accommodate the wants of the public, it became necessary that the joint roads should offer increased facilities for the transportation of passengers and freight.

The facilities of the roads were increased in various ways. The directors of the Nashua & Lowell Railroad appointed committees for the purchase of the Mystic River Railroad, for the location of a new depot to be erected in Boston, and for the purchase of wharf, flats, and terminal facilities in Charlestown, and for the providing of better terminal facilities in Boston. The joint roads united in the purchase of property at East Cambridge, store-houses and wharves on Lowell street, Boston, and the Mystic-wharf property in Charlestown, for the purpose of providing suitable accommodations for increased business. In these purchases the Boston & Lowell Railroad bought 69 per cent. and the Nashua & Lowell Railroad 31 per cent. of the property.

The board of directors of the two contracting corporations were accustomed to hold their meetings at the station in Boston. Questions were put to both boards by the president of both boards. All questions in which there was any supposed separate interest or liability

of the two corporations were put by the presiding officer, first to one board, and then to the other. Each board had its own separate clerk and book of records. The joint roads were operated under the contract until its expiration in 1878.

The present suit relates to two transactions which took place under the joint contract,—the building of the new passenger station in Boston, commenced in 1870 and completed in 1875; and the purchase of the stock of the Lowell & Lawrence and Salem & Lowell Railroads. The plaintiff corporation now seeks to recover back its share of the joint receipts expended for these purposes, on the ground that these acts were unauthorized and illegal under the joint traffic contract.

It is clear from the evidence that, to meet the increased business of the joint roads, and to retain their connection with other lines, it was the opinion of those charged with the management of the roads that increased terminal facilities at Boston were necessary. The Nashua & Lowell road, through its directors, participated in negotiations with the Eastern Railroad to this end. Upon the rejection of the plan of a depot to be occupied jointly with the Eastern Railroad, the two corporations united to provide additional terminal facilities. This subject was early brought to the attention of the stockholders of the Nashua & Lowell Railroad, as appears by the record of the meeting of May 25, 1864, when the directors were empowered to invest the contingent fund of the corporation in lands, warehouses, or other real estate for the better accommodation of the business of the corporation, either upon the line of the road, or at the Boston terminus. In 1869 the directors of both roads sent Gen. Stark, the joint manager, to Europe, for the purpose of obtaining the best plans for the erection of a proper station in Boston. Upon the return of Gen. Stark, plans for a new station were presented to the board of directors of the Nashua & Lowell Railroad, and a report in relation to terminal facilities was made, and accepted by the directors. The plans having been approved by both roads, the question arose as to the manner in which the Nashua & Lowell Company should bear its share of the expense.

On July 23, 1872, the directors of the Nashua & Lowell Railroad voted as follows:

"That the expenditures made and to be made by the Boston & Lowell Railroad Company for land and buildings in Boston for a new station, and the expenditures made and to be made by said corporation for the building and completing the Mystic River Railroad, and for the improvement in Winchester, for a new station and land for railway purposes to the amount of \$20,000, are to be treated in the management of the business under the joint contract existing between said corporation and the Nashua & Lowell Railroad Companies, as follows, viz.: The said Boston & Lowell Railroad Company are to be paid the interest upon such expenditures made and to be made at the rate of seven per cent. per annum, at the end of six months, out of the receipts of the joint corporations under said contract, and which are to be charged as a part of the expenses of operating said railway under said contract; and the cashier of said two corporations and treasurer of the Boston &

Lowell Railroad Company are hereby directed to make up an interest account upon such expenditures to April 1, 1872, and pay the amount found due to the Boston & Lowell Railroad Company, out of the joint receipts of said two corporations."

On the same day the directors of the Boston & Lowell Railroad passed a similar vote. In pursuance of this agreement, the Boston & Lowell Railroad borrowed the necessary funds, at 7 per cent. interest, to construct the Boston station, and issued their bonds therefor for 20 years. The evidence shows that better terminal facilities in Boston were deemed vital to the interests of the joint roads; that the improvements were carried out with the utmost good faith on the part of both corporations; that the directors of the Nashua & Lowell Railroad frequently discussed the necessity of such increased terminal facilities, and finally agreed to the same without dissent; and that in the annual report adopted by the stockholders of the plaintiff corporation, May 27, 1874, we find, in the appendix thereto, a full description of these improvements.

The second subject-matter of controversy concerns the purchase, in the summer of 1871, by the defendant corporation, on its separate account, of a majority of the capital stock of the Salem & Lowell and Lowell & Lawrence Railroads. By the contract of October 1, 1858, the leases of these roads were assumed by the joint roads. It was believed, however, that these leases were without authority of law. It was therefore agreed by the joint corporations, through their respective boards of directors, that the Boston & Lowell Railroad should purchase a controlling interest in these roads, and that the contracting parties, during the continuance of the joint contract, should share the excess of interest upon the purchase money, over the amount of dividends earned upon the purchased stock, in the proportion of 69 and 31 per cent. This arrangement by which the Nashua & Lowell Railroad assumed 31 per cent. of the cost during the continuance of the joint contract was not confined to the building of the new station in Boston, or the purchase of the Lowell & Lawrence and Salem & Lowell stocks, which the plaintiff in the present bill seeks to repudiate, but a like agreement was made as to the station at Winchester and the Mystic-wharf and Mystic Railroad improvements.

No objection was made by any director or stockholder of the plaintiff corporation to these acts until June 25, 1877, when, there having been a change in the board of directors, a vote was passed rescinding the vote of July 23, 1872, wherein it was provided that the Boston & Lowell Company should receive from the Nashua & Lowell Company interest at 7 per cent. upon 31 per cent. of the cost of certain additions made to the property of the Boston & Lowell Company. No attention was paid by the manager to this vote, but he continued to deduct from the joint receipts the amount due from the Nashua & Lowell Railroad Company on account of the improvements and purchases made for the joint interest. In 1878, at the annual meeting, the

stockholders of the Nashua & Lowell Company passed the following resolutions:

"Resolved, that the stockholders of this company have learned with surprise, from the report of the directors this day presented, the fact of the vote passed at the directors' meeting, holden July 23, 1872, and the result of that vote, thus far in depriving this company of more than \$150,000, and in bestowing the same upon the Boston & Lowell Railroad Company.

"Therefore resolved, that in our judgment this vote was passed in the interest of the Boston & Lowell Railroad Company, and in entire disregard of the rights and interests of this company, and of the terms and provisions of the joint traffic contract itself.

"Resolved, that the directors this day elected are requested to take proper measures for restoring to the treasury of this company the sums so diverted from it by the Boston & Lowell Railroad Company."

In September, 1882, the two corporations entered into an agreement to submit their differences to arbitration. The plaintiff denies that any binding award was ever made.

Under these circumstances, can the plaintiff corporation recover back the money which was deducted from the joint receipts, during the continuance of the contract, for its share of the expense for the construction of the passenger station at Boston, and the purchase of the stock of the Salem & Lowell and Lowell & Lawrence Railroads?

The plaintiff rests the right to relief on two general grounds: *First*, that these acts were not duly authorized by the directors; and, *secondly*, that if so authorized the directors had no power to bind the corporation.

That the acts complained of were authorized by the directors of the plaintiff corporation we think there is no doubt, upon the record before us. As to the building of the passenger station in Boston, we need only now refer to the vote of the directors, July 23, 1872; and, in respect to the stock purchase, so called, it appears that the directors of both roads fully discussed the matter, that the purchase was determined upon, and that it was understood by all the directors that the excess of interest upon the sum paid for the stock above the dividends should be paid by both roads in the proportions fixed by the joint contract for the division of profits. It further appears that this matter was usually brought up in some form at the monthly meetings of the directors of both corporations, without objection from any director of the Nashua & Lowell road. Under these circumstances, to hold that the plaintiff corporation is not bound because the records of the corporation disclose no formal vote by the directors, would be contrary to equity. But, whatever informality exists in this respect, the subsequent acquiescence of the directors would bind the corporation, if they acted within their powers. *Creswell v. Lanahan*, 101 U. S. 347.

The main question raised in this case is whether the directors could bind the corporation in respect to the transactions complained of. The directors of a corporation, except so far as they may be expressly

or impliedly restrained by the charter, by-laws, or general law, may do any act which the corporation itself can do or ratify. Wood, Rys. § 153. The general power of directors to perform all corporate acts refers to the ordinary business transactions of the corporation, and not to fundamental and organic changes, like increasing its capital stock, or leasing its plant. *Railway Co. v. Allerton*, 18 Wall. 233; *Thomas v. Railroad Co.*, 101 U. S. 71; *Cass v. Manchester Iron & Steel Co.*, 9 Fed. Rep. 640. But the agreements entered into by the plaintiff corporation respecting the Boston passenger station, and the purchase of the railroad stock, were not of this fundamental character. The plaintiff corporation did not furnish the money for these purposes. All it agreed to do, in return for the mutual benefits conferred, was to pay an amount equal to the interest on 31 per cent. of the cost during the continuance of the contract. Independently of the traffic contract, or as supplementary thereto, we fail to see why the directors had not the power, if they deemed it for the best interests of the corporation, to make these agreements.

To meet the increased business of the joint roads it was found necessary to lease other lines, to increase the terminal facilities at various points, and to make contracts with connecting lines. Sometimes this was done by each of the joint roads separately; sometimes jointly. But all the numerous and various plans which were carried out during the 20 years of the contract appear to have been done in good faith, and for a mutual benefit, and without objection from any one, until a change of management took place in the plaintiff corporation, two years before the expiration of the contract. Under these circumstances it may be said the acts complained of were incidental to the original contract, or, if not strictly incidental, that they were necessary to the proper carrying out of the contract to the best advantage of the joint roads and of the public. The acts complained of were not the only ones of their kind, but the record discloses other transactions of a similar or nearly similar character, about which no complaint is made. Under the circumstances presented in this case, we think the directors acted within their powers, and that their acts bound the plaintiff corporation. Aside from this, there is much evidence going to prove that the stockholders ratified the acts of the directors. We are aware that this is disputed by the plaintiff, largely on the ground of the manner in which the accounts were kept. Upon the whole, we think the evidence goes to show such an acquiescence on the part of the stockholders as forbids them, after this lapse of time, from holding the defendant liable. Again, this contract has been executed. It expired in 1878. The supreme court says, in *Thomas v. Railroad Co.*, 101 U. S. 71, 86: "In regard to corporations the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for or against both parties when the plainest rules of good faith require it."

The plaintiff relies on the case of *March v. Eastern Railroad Co.*, 43 N. H. 515. In that case one road was leased to the other upon certain terms, and then a change of policy was pursued by the lessee, which operated to destroy the benefit or profit which would properly accrue to the lessor under the lease. Whatever *dicta* favorable to the contention of the plaintiff may be found in the case, the facts are so different that we cannot consider the case as applicable to the present one.

These conclusions make it unnecessary to consider the other questions raised. Bill dismissed.

WATERMAN v. WATERMAN.

SAME v. PORTER.

(Circuit Court, D. California. March 1, 1886.)

1. VENDOR AND VENDEE—CONTRACT—CONSIDERATION—WRITTEN CONTRACT.

The real consideration for a contract to convey may be shown, although the contract states only a nominal one.

2. CONTRACT—ADEQUACY OF CONSIDERATION—EVIDENCE.

Where a party advances several thousand dollars to develop certain silver mines, in consideration of which he is to be repaid out of their first product, and receive in addition an undivided fractional part of the mines, *held*, that the contract cannot be avoided on the ground that the consideration was inadequate.

3. SAME—UNCERTAINTY—HARDSHIP.

On the same state of facts, *held*, that the contract cannot be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship.

4. SAME—MUTUALITY—OPTION.

In an action on a contract, want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right.

5. SAME—SECURITY—EVIDENCE.

Evidence considered, and *held* not to sustain the position that the contract to convey was given simply as security for the money advanced.

In Equity.

The actions referred to in the following opinion were brought by the complainant as the assignee of her deceased husband, to compel the specific performance of certain contracts in writing entered into with him by the defendants. One of the contracts was as follows:

"SAN BERNARDINO, May 14, 1881.

"For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that, at any time within twelve months from this date, upon demand of J. S. Waterman, or his heirs, administrators, or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four hundredths (24-100) of the following mines, known as the Alpha, Omega, Silver, Glance, and Front, each being

600 feet front by 1,500 feet long; and the same interest in all the lands that may be located, or have been located, for the development of the above mines; with such machinery and improvements as are to be placed upon the same,—all subject to the same proportion of expenses, which is to be paid out of the development of the above property; all situated near the Grape Vine, in the county of San Bernardino, state of California.

[Signed]

“R. W. WATERMAN.”

The other contract was of a similar character, but was signed by G. L. Porter, who agreed therein to convey, on demand, to J. S. Waterman three one-hundredths of the same mines. The other facts are sufficiently stated in the opinion of the court.

SAWYER, J., (*orally.*) This case of *Waterman* against *Waterman*, is a suit in equity to compel the specific performance of a contract to convey portions of the silver mines described in the bill of complaint. I have gone through this record very carefully. The testimony is very voluminous, and the principal questions are questions of facts. It would be unprofitable to enter into a long discussion of the evidence, and I shall only announce my conclusions in the matter.

In my judgment the plaintiffs are entitled to a decree for the conveyance of the property, and for a reference to take an account of the profits of the undivided portion of which a conveyance is sought.

The legal points made by the defendants are, briefly: first, insufficiency of consideration. The consideration in the written agreement of conveyance mentioned is one dollar. If the parties agree to sell for one dollar, I do not see that anybody has a right to complain. On the face of the bill, and certainly upon the testimony, there is nothing to justify a holding that the consideration, expressed or real, was inadequate. If the amount expressed is adequate for a deed of conveyance, it certainly ought to be adequate to sustain a contract to convey. Besides, it appears that that was not the real consideration at all. The failure to state the full consideration makes no difference. The parties took up a mining claim, had it partially prospected, and, being impecunious, had no means to develop the mine and procure machinery. They entered into an agreement by which another party was to furnish the money, and they gave a contract to convey a part of the property, and besides agreed to pay the money back out of the first proceeds of the mine. The capitalist, J. S. Waterman, advanced in all something over \$26,000, and, in addition to that, his brother, R. W. Waterman, who was one of the parties, received a remission of all the indebtedness due from him to J. S., which was about \$11,000; and that, with \$3,500 to pay private indebtedness, was the real consideration for the contract. J. S. Waterman did not choose to take a conveyance at the time, for the reason that he did not wish to put himself in the position of a partner. This was substantially, *on his side*, an option. For the development of the mine, he was willing to furnish the funds and take that risk for a share of the mine, in case it should prove valuable, but he was not

willing to assume any indebtedness that a mining partnership might incur. I think there is no insufficiency of consideration.

The next point is the uncertainty of the property conveyed, and the hardship of performance. I do not think it is uncertain,—the property being mines, well known by name, and necessarily described in the records of the claims,—nor do I think it would be a hardship to enforce the contract. The names and records furnish the means of sufficient identification. There is no hardship about it. It would be a great hardship to the other party if it was not enforced. The party who advanced the money, and who was entitled to receive the conveyance, is the one who took all the risk. He had everything to lose and nothing to gain, on the theory set up by the defendant, while the other side had everything to gain and nothing to lose. The hardship would be directly the other way. It was complainant's assignor's money that was invested, and it was his money that secured the mines. If it turns out that the mines are valuable, and that the conveyance would be valuable to him, the result is still more valuable to defendants.

The next thing set up is want of mutuality. You might as well say that there was a want of mutuality in a promissory note, and that a payee could not recover because the other party could not be compelled to take the money. If the obligors chose to give him this option, and to receive the large consideration of \$26,000, which was to be paid back only out of the first products of the mine, besides a large indebtedness which he was not to receive back at all,—if they were satisfied to give him this option, I do not think they can complain if he should choose to accept the option when it turned out to his advantage to do so, even if he was anxious to know the extent of his liability, and to refuse to give authority to them, on the other side, to run him into debt to an unlimited extent. I do not perceive why he could not make the agreement with the consent of the other parties, and why it should not bind the other parties when made. He gave an ample consideration. Whatever effect this might have upon the rights of creditors is outside of the present question. The defendants agreed to it, and it was sufficient as to them.

Other defenses are pleaded which I do not think are sustained by the evidence. One is that it was only given as security. Manifestly it was not intended for any such purpose. If it was security, the security would be no better with than without it, because the money was to be paid only out of the mine, in any event; and if the mine did not produce the money, it would not be paid, and it would have little value as security. Besides, he absolutely gave up an indebtedness not to be returned or secured. That claim as to security was never made until set up in the answer. Even when the complainant first wrote to defendants to demand a conveyance, they did not set up security at all as a ground of defense. The ground relied on by the brother of Waterman was that his brother only took it, so that, in case

it ever came to him, he could give it to defendant's own children. I do not think the testimony is sufficient to justify the court in coming to that conclusion. Evidently the deceased, James S. Waterman, to whom this contract was given, did not act upon that supposition; neither is there any evidence that any of these parties did until after his death, nor even till the conveyance was demanded. I shall therefore order a decree, in pursuance of the prayer of the complaint, for conveyance of the property, and that it be referred to the master to ascertain the profits that have been made.

The other case against Porter is for the same thing, except for a smaller amount. Waterman agrees to convey twenty-four hundredths and Porter three hundredths of the mine. The only defense that Porter sets up is that it was merely as security. Manifestly he did not set that up in response to the demand of the complainant for a conveyance. He seemed at that time to recognize the liability, by implication at least, but was not certain to whom the conveyance should be made. He thought that the family should first settle their affairs before he was called upon to convey; but, briefly, the defense stands upon the same footing as in the other case. These parties all obtained assistance from the deceased, and assignor of complainant here; and through his aid, and at his risk, secured mines that turned out to be valuable, one of them now having one-half and the other nearly one-quarter. Justice requires that they convey the small part so richly earned, and which the defendants agreed to convey.

I am satisfied, from the testimony, that the same decree should be made in this case that was made in the other.

THE HOLLADAY CASE.

HICKOX *v.* ELLIOTT and others.

(Circuit Court, D. Oregon. June 14, 1886.)

1. CHAMPERTY—LIMITATION.

The former ruling of this court in this case (10 Sawy. 415, and 23 Fed. Rep. 13) that the agreement made in California on February 10, 1874, between S. G. Elliott and Martin White, for the loan and repayment of money, was to be performed in that state, and is not champertous, and that a suit may be maintained to enforce a security for a debt arising thereon, without reference to whether an action on the debt directly against the debtor can be maintained or not, considered and affirmed.¹

2. SAME—RES JUDICATA.

The obligation of White under said agreement, and the fact of his having performed the same, is *res judicata* since July 13, 1875, by the judgment of a competent court in *White v. Elliott*.

¹ See note at end of case, pt. 1.

8. ATTORNEY'S FEE.

A contract to pay an attorney \$400 a month to attend to certain litigation *held* to have been tacitly abandoned by reason of unforeseen delays in the progress of the litigation, and a gross sum allowed for the services of the attorney thereafter.

4. COURTS—CONCURRENT JURISDICTION—RECEIVER.

The mere fact that a court has acquired jurisdiction of a suit between a grantor and grantee concerning their rights in certain property, and has taken possession of such property by the appointment of a receiver, does not prevent another court of concurrent jurisdiction from taking jurisdiction of a suit by a creditor of said grantor against said grantee, brought to set aside or postpone the conveyance of said property to the latter on the ground that it was made and received with intent to hinder and delay the plaintiff in the collection of his demand against the grantor; the relief sought may be granted without interfering with the possession of the receiver.

5. EQUITY—ANSWER IN EQUITY.

A defendant may answer an allegation in a bill that he has no knowledge, information, or belief concerning the same, and the effect is to leave the matter to be proven by the plaintiff; but such answer is not equivalent, as evidence, to a denial of the fact alleged, nor can the defendant add a direct denial thereof to his answer that he has not even a belief on the subject.

6. DEPOSITIONS—OBJECTION TO.

A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing.

7. EQUITY—CREDITORS' BILL—JUDGMENT—PROOF OF DEBT.

A judgment creditor seeking to set aside conveyances anterior in date to his judgment, because made to hinder and delay him in the collection of his debt, may show by the proceedings in the case prior to the judgment, or other competent evidence, that his debt existed at or prior to the date of such conveyances.

8. SAME—INSOLVENCY OF DEBTOR.

It is not necessary to issue an execution on a judgment and have a return of *nulla bona* thereon, to show the insolvency of the judgment debtor, but the fact may be shown by any competent evidence that he has no property subject to the legal process of the court in which the judgment remains.

9. FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE.

It is not necessary that the grantee in a deed made by a debtor to hinder and delay his creditors should have actual knowledge of the grantor's intent to make it void; but it is sufficient if he have knowledge of facts sufficient to put a prudent man on inquiry.¹

10. SAME—CASE IN JUDGMENT.

Conveyances made by an insolvent debtor to his brother, who was a large creditor, of all his property in the state, the value of the same being considerably in excess of the amount of the grantee's debt, without any settlement or agreement as to values, or cancellation or surrender of the evidences of debt held by the creditor, or any special change in the management of the property included in the conveyances, together with the fact that the grantor continued in the receipt of a large portion of the rents and profits of the property, *held* sufficient evidence of fraudulent intent of the grantor, and of the grantee's participation therein.

Suit in Equity to Set Aside Fraudulent Conveyances.

James K. Kelly and C. E. S. Wood, for plaintiff.

Henry Ach, for defendant Effinger.

Thomas N. Strong, for defendant Joseph Holladay.

J. K. Weatherford, for defendant Elliott.

DEADY, J. This suit is brought by George C. Hickox, a citizen of California, against Simon G. Elliott, Joseph Holladay, William H.

¹See note at end of case, pt. 2.

Effinger, and Ben Holladay, as citizens of Oregon, to subject certain property, the legal title of which is now in Joseph Holladay, to the payment of a certain decree, heretofore given by the supreme court of Oregon, against Ben Holladay, on the ground that said property was assigned, transferred, and conveyed to the former by the latter, to hinder and delay his creditors; and that the plaintiff is the assignee of said decree, in trust for Martin White, a creditor of said Elliott. The case was before this court on November 12, 1884, on a demurrer to the bill, and the judgment of the court thereon is reported in 10 Sawy. 415, and 22 Fed. Rep. 13. On March 16, 1885, the suit was dismissed as to Ben Holladay on his plea in abatement, to the effect that he "is a citizen of the city of Washington, in the District of Columbia." The plea was considered as the equivalent of an allegation that the defendant is not a citizen of any state in the Union, and therefore not suable here on the ground of his citizenship.

Briefly, the case stated in the bill, and admitted by the answers or made by the proof, is this:

On September 12, 1868, Elliott entered into a partnership with Ben Holladay and C. Temple Emmet, for the purpose of constructing and operating railways in Oregon, which partnership was engaged in the construction of the road of the Oregon Central Railway Company until November 5, 1869, when Holladay and Emmet commenced a suit in the circuit court for the county of Multnomah to dissolve said partnership, which suit was afterwards transferred to Marion county, where, on September 28, 1877, a decree was made dissolving said partnership and declaring Elliott indebted thereto in the sum of \$470, from which decree Elliott took an appeal to the supreme court of the state, wherein, on August 15, 1879, a decree was given dissolving said partnership, and that Elliott recover from Holladay \$21,919.46, and from Emmet \$8,596.08, together with nine-tenths of the costs in both the appellate and lower court, amounting, as taxed, to \$2,710.76; and there is now due on said decree from said Holladay, principal and costs, the sum of \$24,630.22, with interest from August 15, 1879, to January 25, 1881, at the rate of 10 per centum per annum, and thereafter at the rate of 8 per centum until date; in all, the sum of \$38,806.29.

On February 10, 1874, Elliott, being without means or credit, applied to Martin White, then and now a citizen of California, for a loan of \$12,000, to enable him to assert and maintain his rights in said suit, and offered to secure the payment of the same by an assignment of all his right, title, and interest in the property involved therein, to the plaintiff, in trust for said White. Thereupon, a contract was duly made and signed by said Elliott and White, which in effect recites that a controversy exists between Elliott and Holladay and others, concerning Elliott's "right" in the property, franchise, and rights of the Oregon Central Railroad Company, and that, "for the purpose of asserting and maintaining his rights in said contro-

versy, said Elliott has borrowed from Martin White the sum of \$12,000 in gold coin of the United States, and has agreed to repay the same within one year from the date of the last installment thereof, as hereinafter provided, (and within two years from the date hereof, whether the last installment shall be demanded by said Elliott within one year from the date hereof or not,) with interest on each installment from the date of the advance thereof at the rate of 10 per centum per annum." The agreement continues, that, in consideration of the premises, "Elliott has granted to White the option," to be exercised within 60 days after Elliott shall obtain possession of said property, "and notified White thereof," to take in lieu of the repayment of said loan one-half of all the property recovered by said Elliott, less 1,000,000 of the bonds of the Oregon Central Company reserved for the use of the latter, and not exceeding \$100,000 of the same for his attorney. "And to secure the performance of this agreement on his part, and to secure the payment of any additional advances not exceeding \$13,000 that he may obtain from said White or other parties, said Elliott has assigned and conveyed in trust to George C. Hickox all his right and title, interest and claim, in and to the property aforesaid." "And in consideration of the agreement and acts of said Elliott, said White has agreed to loan to said Elliott said sum of \$12,000 in gold coin of the United States, and to advance the same upon his demand in installments from time to time, as the same shall be required, upon the terms aforesaid." See *Hickox v. Elliott*, 10 Sawy. 417, S. C. 22 Fed. Rep. 14, 15, where this agreement is set out in full.

In pursuance of this agreement, Elliott, on February 13, 1874, executed and delivered to the plaintiff the following sale and assignment:

"In consideration of the sum of \$12,000 in gold coin of the United States to me paid, and other valuable considerations, I, S. G. Elliott, of the commonwealth of Massachusetts, have granted, bargained, sold, and assigned, and by these presents do grant, bargain, sell, and assign, unto George C. Hickox, of the city and county of San Francisco, state of California, all my right, title, interest, and claim, both in law and equity, in and upon the stock, property, and assets of the Oregon Central Railroad Company of Salem, Or., and the Oregon & California Railroad Company, of Portland, Or., the firm of A. J. Cook & Co., and the firm of Ben Holladay & Co."

White claims and testifies that between the date of said agreement and March 25, 1879, he advanced to Elliott thereunder, or to others for him, the sum of \$22,201.15. It is not questioned but that he advanced this sum, as stated in the account thereof attached to his deposition herein. But Elliott contends that White failed to advance him money as the agreement required, whereby the arrangement fell through and the assignment became inoperative; and that all sums paid out by White, as set forth in his account, after July 24, 1874, were so paid without his authority or consent, for which he is not liable. This contention is based on the assumption that White un-

undertook to advance Elliott not exceeding \$25,000, when and as he might require or demand it. But the truth is, White never undertook anything of the kind. Taking this agreement and assignment together, and reading them by the light of the surrounding circumstances, it is evident that White did not undertake absolutely to advance Elliott more than \$12,000, and only so much of that amount as might be necessary, from time to time, to enable the latter to properly carry on the controversy with his partners, which was expected to be brought to an end within the coming year, and that any additional advance that Elliott might obtain from White or other persons, not exceeding \$13,000, should be equally secured by this assignment; but White did not undertake to furnish any portion of said additional advance.

Elliott admits that prior to July 2, 1874, and scarcely five months from the date of the contract, White had advanced him \$8,592.50, the larger portion of which appears to have been applied to the former's private use, and not to the expense of the litigation with Holladay & Co. But the evidence shows that by July 14, 1874, there was advanced to Elliott by White \$11,718.50, and that on August 18th thereafter the latter paid Domnett a note of \$363, which he had accepted for the former, in the February preceding, making the sum thus advanced \$12,082.25, or \$82.25 in excess of the sum stipulated.

On April 29, 1874, when over \$7,000 had been advanced to Elliott, he drew on White from Portland in favor of himself for \$500, and the defendant Effinger, who was his attorney, for \$1,500. On May 6th these drafts were protested for non-payment, and three days afterwards White wrote Elliott, rebuking him sharply for drawing on him for such sums or at all, after he had been advised not to draw on him for a dollar. The letter was put in evidence by Elliott. In the course of it White says if you need some small amounts "for incidental uses in the suit," write and let me know, and I will send my check therefor. "I have already let you have enough to meet all coming [current] expenses, had it been applied to that purpose; in fact, I have advanced it twice as fast as I expected to, when I began." I would be glad to furnish the \$1,500 for Mr. Effinger. "I have no doubt he needs the money, but under the circumstances I cannot see any way to let him have it at present." With this letter White sent Elliott his check for \$250 "to defray incidental expenses."

On July 24, 1874, Elliott being in San Francisco, and in need as usual, drew on White in favor of Johnson & Co. for the sums of \$325 and \$1,575, and the defendant Effinger for the sum of \$600, which sums White declined to pay, as he told Elliott he would before the drafts were drawn.

Thereafter, Elliott testifies that he considered the arrangement with White at an end, and the assignment inoperative.

The only item in White's account of the \$12,000 advanced to Elliott,

now disputed by the latter, is the \$2,465 paid by the former to discharge a debt of Elliott's of that amount secured by a mortgage on the property assigned to the plaintiff, as a security for White, and called the Mackey-Toomey mortgage. It is reasonable to suppose that when White agreed to advance \$12,000 on the security of this assignment, that for his own protection he would require or provide that a prior mortgage thereon for not less than \$2,000 should be taken up or satisfied out of that sum. And the evidence is very satisfactory that such was the distinct understanding of the parties to this arrangement.

On July 1st the defendants Elliott and Effinger were in San Francisco, the latter having in his possession this mortgage for Mr. Toomey, who was anxious to realize on it. White, having knowledge of these facts, and being about to go to Nevada, to be absent some time, on the next day deposited with Mr. R. P. Clement, the attorney for Elliott, \$3,400, that being the remainder of the \$12,000 yet unadvanced; and informed Elliott of the fact, and told him to take Effinger to Clement the next day, and have the mortgage paid, and receive the balance of the money. But Elliott tried to effect an arrangement by which the mortgage could be satisfied, and the debt otherwise secured, so that he could draw the full amount deposited with Clement; and, being unable to do this, he drew from Clement, on July 3d, \$650, and the 13th and 14th, \$200, leaving only \$2,550 for the payment of the mortgage, whereon \$2,645 was then due; which sum White, on August 31st, thereafter paid to Effinger on Elliott's account.

From this it appears that although White had not advanced the full sum of \$12,000 on April 29, 1874, still Elliott had no right, under the contract, to draw on him for such sums as he did, or at all, because he had already received a much larger sum under the contract than he had any right to expect or demand, within the time which had elapsed since it was made. But really this is not an open question between these parties. From defendant Elliott's Exhibit 18, it appears that on September 25, 1874, White commenced a suit in the Twelfth district court, of San Francisco, to enjoin him from disposing of the property covered by the assignment to the plaintiff, in which he set out the agreement and assignment of February 10 and 13, 1874, and alleged that the advances then made thereunder amounted to \$13,337.25. In an answer and cross-complaint, filed November 4, 1874, Elliott admitted the execution and existence of the agreement and assignment, but denied that White had advanced thereunder \$13,337.25, but only \$8,592.50; and alleges that he agreed to loan him \$25,000, "as he might wish to use or draw the same;" and claimed \$100,000 damages for the alleged failure to do so; and prayed that the agreement and assignment might be declared null and void; and on April 9, 1875, the court found that prior to the commencement of that action White had "lent and advanced"

Elliott \$12,000, "as the same was required for the purpose mentioned in said agreement;" that White "never agreed to lend Elliott \$25,000, or any other or greater sum than \$12,000; and that Elliott was not entitled to recover any damage in that action, or have either said agreement or assignment 'annulled;'" on which finding there was a judgment duly given by said court on July 13, 1875, which still remains in full force and effect.

By this finding and judgment the parties thereto are bound. The fact that White advanced Elliott \$12,000, under the agreement, before September 25, 1874; that he never agreed to furnish him any more; and that the agreement and assignment were valid and binding instruments,—is *res judicata*, and no longer open to question. *Davis v. Brown*, 94 U. S. 428; *Cromwell v. County of Sac*, Id. 353; *Russell v. Place*, Id. 608; *Beloit v. Morgan*, 7 Wall. 619; *Outram v. Morewood*, 3 East, 346; *Sharon v. Hill*, 26 Fed. Rep. 344; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 277.

The payments and advances made by White in and about the litigation with Holladay & Co., in excess of the sum of \$12,000, are not necessarily secured by this assignment. Whatever Elliott obtained from him for that purpose is so secured. The advance or payment must have been made with the consent, express or implied, of Elliott; and the nature and necessity of the advance has much to do with the question of an implied consent. It is true, White had a direct interest in the subject of the litigation which may have justified him in incurring expense in protecting the same, and would have authorized him, under the circumstances, to apply to the court to be allowed to intervene and conduct the cause, as the real or principal party in interest. But even then his advances or expenses would not necessarily be secured by this assignment. There must have been an express or implied assent to the expenditure by Elliott.

On this view of the matter, I think the following items in White's account ought to be included in the sum for which the assignment is a security: September 16 and October 31, 1874, payments to Mr. Effinger, the leading counsel in the litigation with Holladay & Co., \$500 and \$1,500. Elliott had already drawn on White for these sums, and \$100 more, for this very purpose; and although the latter did not then advance the money, he paid it to Effinger soon after, with Elliott's knowledge and apparent approbation. At least, no objection was made to the payment at the time. It was a matter of vital importance to the maintenance of Elliott's rights in the matters then in controversy; and, in the absence of any act or word to the contrary, his assent to an act so well calculated to benefit himself ought to be presumed. September 3 and October 1 and 12, 1875, payments to Moreland, referee, \$20, \$20, and \$600, the amount due from Elliott for fees and charges. These payments were absolutely necessary to get the report of the referee before the court. No objection appears to have been made at the time, and Elliott's assent

may be presumed. September 20 and November 25, 1879, payments for printing briefs in San Francisco, and expressage to Portland, \$234.60 and \$23. This brief was prepared and printed in San Francisco, under the direction of Elliott, and the charges paid by White were for his benefit and with his implied assent. Altogether, these items make the sum of \$14,979.85, for which this assignment is a security, and for the amount of which, with interest, the plaintiff is the assignee of the judgment against Ben Holladay, in trust for White, and entitled to maintain this suit for its enforcement. *Hickox v. Elliott*, 10 Sawy. 422; S. C. 22 Fed. Rep. 17.

Averaging the periods during which these four sums were advanced, and adding interest thereon from that time to this, at the rate of 10 per centum per annum, gives the whole amount for which the assignment is security as follows: Interest on \$12,082.25, from April 15, 1879, \$14,699.85; interest on \$2,000, from October 1, 1874, \$2,422.22; interest on \$640, from September 15, 1875, \$778.60; interest on \$257.60, from March 15, 1879, \$323.51; total principal, \$14,979.85; total interest, \$18,224.17; whole amount of claim, \$33,204.02. Of the remaining \$7,221.30 of the gross amount (\$22,201.15) advanced and paid by White in and about this litigation, nearly \$5,000 went to L. L. Bullock.

Mr. Bullock was in the employ of Elliott, in the litigation with Holladay & Co., as what may be called an "outside man," when White made the arrangement with Elliott to advance him money. Thereafter he was paid a monthly stipend much of the time, down to the spring of 1879. I think the payments made to him after July, 1874, and particularly after the suit commenced by White against Elliott, in September of that year, may be safely regarded as having been made for services rendered White, if any one, although they may have been of benefit to Elliott as well. At least, there is nothing in the nature of the services, or the necessity for them, so far as appears, which justifies the conclusion that Elliott assented to the payments being made on his account.

On the hearing of the demurrer to this bill it was claimed for the defendant Elliott that the suit was barred by the lapse of time, and that the contract on which the money was advanced was void for champerty. The same defenses are now set up in his answer, and insisted on in the argument. But I see no reason to question the soundness of the conclusions then reached on these points. As was then said:

"It is immaterial whether an action could now be maintained by White against Elliott to recover this money or not. This is not such an action, but a suit brought by a person, claiming to be the assignee of a decree, to subject the property of the debtor therein to its payment and satisfaction. And it can be maintained, although the right of action against Elliott to recover the money in question is barred by lapse of time. The statute bars the remedy against Elliott in six years, but does not destroy the debt, and it still exists, for the purpose of enforcing any lien or pledge given to secure its payment.

Quantock v. England, 5 Burr. 2628; *Sparks v. Pico*, 1 McAllister, 497; *Myer v. Beal*, 5 Or. 130; *Goodwin v. Morris*, 9 Or. 322; 2 Pars. Cont. 379; *Rapalje & L. Law Dict. 'Limitations.'*" 22 Fed. Rep. 17.

This contract is claimed to be champertous, and therefore void, mainly on the option clause therein, whereby White was given the choice, within 60 days after Elliott had recovered possession of the railway property in question, and some millions of bonds of the company, and notified White thereof, of taking, in lieu of his money with interest, one-half thereof, less \$1,100,000 of the bonds reserved for the private use of Elliott and his attorney. This clause was put into the contract at the suggestion of Elliott, to give the transaction and the subject thereof an air of importance and vastness to which it was not entitled. As was determined by the supreme court of the state in its judgment in *Holladay v. Elliott*, these bonds were issued by a corporation (the Oregon Central) that was a sham and a fraud from its inception, and were utterly worthless. But Elliott did not recover any railway property or bonds in the suit, and of course did not give notice to White to exercise his option. The contingency never happened on which this clause in the contract was to take effect. Nothing was ever claimed or done under it, and, practically, it is no part of the agreement. And, even admitting that the validity of the contract for the loan and repayment of the money is to be tried by the law of this state, I do not believe that the courts thereof will ever hold a contract champertous or void for maintenance, whereby a party not an attorney in the case, or at all, lends a man, in straitened circumstances, money to enable him to maintain his rights in the courts, against powerful and wealthy adversaries, on the promise to repay the same, with legal interest, secured by a mortgage on his interest in the subject of the litigation. If so, one man could not safely loan another money to defend an action brought to dispossess him of his farm or homestead.

In the brief of counsel for Elliott it is stated that the supreme court of the state, since the decision in this case on the demurrer to the bill, has held, in the unreported case of ——— v. *Sears*, "that champerty does exist in all its force in this state." It is also understood that the case is still pending on a rehearing. But I cannot, in a matter of this importance, act on any such informal and indefinite information concerning the judgment of that court. If not published in authentic form, a certified copy of the opinion should have been obtained from the clerk. However, I am still satisfied with the conclusion reached on the demurrer to the bill. It was then said, (10 Sawy. 430; 22 Fed. Rep. 23:) "This contract was made in California, and in contemplation of law was to be fulfilled or performed there." It is not only the *lex loci contractus*, but also the *lex loci solutionis*. "It has been held in that state since 1863 that there is no law there against any form of maintenance. *Mathewson v. Fitch*, 22 Cal. 93; *Hoffman v. Vallejo*, 45 Cal. 566. And the contract being

valid there, is valid here. Story, Const. Law, §§ 242, (1,) 279, 280."

And on the point, now urged again, that security was taken for the performance of the contract on property in Oregon, which makes it a contract to be performed here, and therefore its validity is to be tested by the laws of this state, it was said: "The authorities are uniformly otherwise." Story, Const. Law, § 287; *De Wolf v. Johnson*, 10 Wheat. 367. In the latter case Mr. Justice JOHNSON, speaking for the court, says:

"Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled when the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money; and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract."

In support of his argument, counsel for Elliott now cites Whart. Const. Law, §§ 402, 509-511, and *Parsons v. Trask*, 7 Gray, 473. The first citation from Wharton is only to the effect that the mode of payment is determined by the law of the place of payment, and that the latter is inferred from the facts. In the other three sections the question is discussed as to what determines the validity of a contract to pay interest, in which the learned writer truly says: "This question has been frequently litigated in the United States, and with results which, on their face, are irreconcilable." But neither of them bear on the question whether the validity of this contract, as to champerty, is to be determined by the law of California or Oregon. But, at section 403, Wharton, after stating that so far as performance is concerned, where the law of the place of solemnization of a contract conflicts with that of the place of performance, the latter controls; and that the validity of a mortgage depends on the law of the place where the thing exists, because there alone payment can be enforced,—says, at note 4: "But this is otherwise when a foreign mortgage is taken as collateral security merely, in which case the place of performance is the place of the payment of the principal bond;" citing the case of *De Wolf v. Johnson*, *supra*. In *Parsons v. Trask* it was merely decided that a contract made in a foreign country, by which an adult person bound herself to serve a citizen of the United States for five years, for \$10, and board, lodging, and clothes, without specifying the nature or extent of the service, or the place of performance, even if valid where made, gave no right to the service in Massachusetts, because contrary to the laws and policy of that commonwealth.

But the question here is, where was this contract—this agreement to loan and repay this money—to be performed? If it was to be performed here, then the law of this state as to champerty may apply; otherwise not. The contract was executed in California, and the money loaned there, and the only reasonable inference from the facts is that the repayment was to be made there also. Both par-

ties lived in that state. There was nothing in the agreement to the contrary, nor anything in the situation or circumstances of the parties, present or prospective, that pointed in any other direction. Nor does the fact that collateral security was taken for such repayment on property in Oregon change its character in this respect. On the contrary, such security, as a mere incident of the debt, is so far valid or not according to the law of the place where the loan was made and to be repaid.

Another point is now first made, by counsel for Elliott, on section 161 of the Penal Code of California, which makes it a misdemeanor for an attorney to directly or indirectly buy any evidence of debt or thing in action, with intent to bring suit thereon. It may be admitted that a contract of sale or assignment, the making of which involves the commission of a misdemeanor, is impliedly prohibited and void. The agreement by which the money was loaned, and repayment promised, does not come within this section. The transaction, so far, was not a purchase of anything, but a loan. Nor does the section effect the sale or assignment to Hickox; because whatever passed by the same was obtained, not with intent to bring suit thereon,—to stir up strife,—but to defend one already pending. Nor were Hickox or White attorneys at the time of the transaction. The former never was an attorney. White was admitted to the bar in California in 1859, and in 1864 quit the practice on account of his health, and has been engaged in mines and mining ever since. Admitting, then, that White indirectly acquired whatever Hickox took in trust for him by the assignment, I do not think, on the facts, he was an attorney, within the meaning of the statute.

From the evidence it appears that the defendant Effinger was retained by Elliott in the case of *Holladay v. Elliott* in the fall of 1872. Thereafter, on December 1st, Elliott agreed to pay him \$400 a month to act as his attorney until the termination of the controversy. By November 4, 1874, he had received from Elliott \$1,450, and from White, on the latter's account, \$2,000,—in all, \$3,450. The suit dragged along for reasons not always within the control of Elliott, and still less of his attorney, and was not finally decided until 1879, when Effinger filed a notice of lien on the judgment, in pursuance of the statute, (Code Civil Proc. § 1012, sub. 4,) for the sum of \$31,800, the amount of his compensation, reckoned at \$400 per month, from December 1, 1872, to the date of the decree, less the sum of \$3,450, received thereon, as above stated.

I do not think, under the circumstances, that this contract ought to be considered in force after 1874. Shortly before White advanced him the \$2,000, Mr. Effinger, seeing the difficulties and delays in which Elliott was involved, wrote the former, offering to take \$3,000 in addition to what he had already received, in full of his services to date, and such other and further compensation at the end of the litigation as might be considered reasonable, under the circumstances.

On this suggestion, White seems to have advanced the \$2,000, which Effinger tacitly accepted, and thereafter looked to what might be obtained in the suit as the measure and means of any further compensation. Certainly it was never in the contemplation of the parties that this large compensation was running on from month to month, and year to year, while the suit was much of the time at a stand-still.

Effinger testifies that when judgment was obtained in the supreme court he purposed to apportion it between White, Elliott, and himself; but the latter immediately repudiated his claim and White's also; whereupon, as a protection for both himself and White, he fell back on his contract, and filed the notice of lien accordingly. And the controversy between these two is now, apparently, a friendly one, and may be adjusted by them irrespective of the action of this court. An unconditional fee of \$5,000, promptly paid or secured, would, in my judgment, be a reasonable compensation for Mr. Effinger's services. But if the compensation was wholly contingent on success,—dependent on making the money out of the litigation,—\$10,000 would not be an unreasonable fee. After 1874, Effinger's compensation was practically contingent, not only on getting a decree, but in realizing on it. This delay and risk must be considered in fixing the amount of this contingent compensation. In addition to the \$3,450 he received prior to 1875, I will allow him the sum of \$5,000, with legal interest from August 15, 1879, the date of the judgment, which amounts to \$7,871.85.

The defendant Joseph Holladay states in his answer that he has "no knowledge, information, remembrance, or belief" as to the alleged contract and assignment, or the payment of any money thereunder by White, "wherefore he denies" the same. On the hearing he claimed the benefit of this denial as being evidence against the existence of such writings and the making of such payments. This allegation is a motley of code and equity pleading, but not proper under either. The Code does allow a defendant to controvert an allegation in the complaint by denying "any knowledge or information thereof sufficient to form a belief," but not on that account to deny the allegation itself. In equity a defendant who has no knowledge, information, or belief concerning the matter of an allegation should say so; and this is sufficient to put the plaintiff on the proof thereof. But such an answer is not evidence that requires at least one witness and corroborating circumstances to overcome. It is a mere negation, and proves nothing; and the addition, "wherefore he denies the same," amounts to nothing except to stultify the defendant; for how can a party truthfully deny an allegation of which he has just affirmed he has not even a belief. *Clark v. Van Riemsdyk*, 9 Cranch, 160; *Brooks v. Byam*, 1 Story, 301; *Dutilh v. Coursault*, 5 Cranch, C. C. 351.

At the close of the argument, counsel for Holladay also filed a motion to suppress the copies of the agreement and assignment, marked

in the margin, respectively, Exhibits "A" and "B," "GEORGE T. Knox, Notary Public," and attached to the commission on which the depositions of the plaintiff and Martin White were taken. Both witnesses were asked about the contract and assignment. White, who was examined first, after answering that he had not the originals in his possession, added: "But I hereunto attach a certified copy" of said agreement and assignment, marked Exhibits "A" and "B." Hickox testified that the original contract and assignment were in his possession, and spoke as if he had them there in the presence of the commissioner, and added: "Under advice, I prefer to retain" them, "but a certified copy is attached hereto;" and, in the case of the assignment, he gave the place, book, and page of its record in Oregon.

There is but one Exhibit A and B attached to the commission, and that is doubtless the one to which both witnesses refer, and which was probably furnished by Hickox. They are true copies of the agreement and assignment mentioned in the bill, and set out in the pleadings, in the case of *White v. Elliott*, and are doubtless what they purport to be,—true copies of the original writings in the possession of Hickox. Attached to each exhibit is the certificate of Edward Chattin, a notary public and commissioner for Oregon, to the effect that he had compared it with the original in the possession of Hickox, and that it was a true copy thereof.

Had the officer who took these depositions done so in due form of law, it would appear therefrom that the witness produced the original writings before him, and identified them; but, not desiring to give up the possession, he allowed the commissioner to take copies of them, which the latter attached to the commission, with his certificate that they were true copies of the original writings produced by the witness, and referred to in his testimony. *Dundee, etc., Co. v. Cooper*, 26 Fed. Rep. 665. Discarding the certificate of Chattin, who was a mere volunteer, and without authority in the premises, it does appear, at least inferentially, that the witness Hickox, in whose custody the original writings then were, produced them before the commissioner, and furnished him with what he testified were true copies of the same; and that the commissioner, either on the strength of that statement or his own examination, and it may be on both, indorsed said copies as the Exhibits A and B referred to in the testimony of White and Hickox, and attached them as such to the commission, with the depositions. That all this is technically insufficient, for lack of an express certificate by the commissioner that he had compared the alleged copies with the originals, and found them correct, may be admitted. But the objection is one that cannot be made at the hearing. It should have been made by a motion to suppress before the cause was set for hearing, when, if allowed, the mistake might have been corrected by retaking the depositions. When cause is set for hearing all technical objections to the reading of

the testimony on file are waived. *York Co. v. Central R. R.*, 3 Wall. 113; *Blackburn v. Crawfords*, Id. 191. See rules 27 and 28 of this court.

The answer of Holladay also contains an allegation in bar of this suit, to the effect that on November 7, 1883, and prior to the commencement thereof, the circuit court of the state for the county of Multnomah, in a suit then pending therein between Ben Holladay and Joseph Holladay, appointed a receiver of all the property mentioned in the bill herein, who is now in possession of the same as such receiver, which suit is still pending in said court. In support of this defense counsel submit the proposition that while property is in the hands of a receiver appointed by a court, no other court can acquire or take jurisdiction of a suit concerning such property, and cites a number of authorities in support thereof. But the proposition is altogether too broad, and is unsupported by the authorities cited. The receiver has no right in the property, but only the possession thereof. So long as that is not disturbed or questioned, parties may litigate in the same court, or elsewhere, questions concerning the ultimate right and title to the property. And therefore, notwithstanding the suit of *Holladay v. Holladay*, and the possession of the receiver therein, this court may take jurisdiction of a suit to set aside or postpone an alleged fraudulent conveyance of any of this property by Ben Holladay which hinders or delays the plaintiff in the enforcement of his judgment against said Holladay. In *Buck v. Colbath*, 3 Wall. 334, this question is examined by Mr. Justice MILLER, and the conclusion reached that the rule, among courts of concurrent jurisdiction, that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising therein, is subject to limitations. See, also, *Andrews v. Smith*, 19 Blatchf. 100; S. C. 5 Fed. Rep. 833.

The object of the suit in the state court between the two Holladays is not stated in the answer. But, in the nature of things, it cannot involve the matters in controversy here, and particularly the question of whether the plaintiff is entitled, as a creditor of Ben Holladay, to have these conveyances to Joseph Holladay set aside or postponed in favor of the judgment against the former. If this court should find that these conveyances were made with intent to hinder and delay the plaintiff in the collection of his demand, under such circumstance as makes the grantee therein a participant in the fraud, it would be its duty to decree that they be set aside or postponed in favor of the plaintiff's judgment. So far there would be no interference with the process of the state court or the possession of its receiver. Whether this court will stop there, and remit the plaintiff to his execution out of the same state court on his judgment therein, or provide for the sale of so much of the property by a master as may be sufficient to satisfy the same, together with the costs incurred in this court, will depend on circumstances. The latter course cannot

be pursued while the receiver is in charge, for that would necessarily interfere with his possession.

But so long as the plaintiff's right to enforce the judgment, and for the amount found due him, depends on a decree of this court, it is proper, and very convenient, that any disposition of the property in question to satisfy the same should be made on its process. And provision may be made in the decree that the sale shall be delayed until the receiver is discharged, or that the plaintiff may apply, on the footing of the decree, for an order of sale as soon as such discharge takes place.

The defendant Joseph Holladay also makes the further points against the plaintiff's right to relief: (1) The bill does not allege, and it is not shown, that there was any debt due from Ben Holladay to the plaintiff or his assignor prior to the date of the conveyances sought to be set aside, or any of them; (2) it does not appear that any execution has ever been issued on the decree against Holladay; and (3) there is no evidence that Holladay is insolvent and unable to satisfy the decree, except from the property in question.

The bill alleges that on November 5, 1869, and long prior to the date of any of the conveyances to Joseph Holladay, that a suit was commenced by Ben Holladay against Elliott, to dissolve the partnership of Holladay & Co., and for the settlement of its accounts, in which a final judgment was given in the supreme court dissolving said partnership as of the date of the commencement thereof, and that Elliott recover from said Holladay the sum of \$21,919.46, and costs; and the answer of the defendant Holladay admits the allegation, word for word. The allegation might have been more specific, and stated that the sum recovered represented the indebtedness of Ben Holladay to his copartner Elliott at the commencement of the suit. But such is the necessary implication of the allegation as it stands. The indebtedness must have existed on November 5, 1869, from which time the court determined the partnership was dissolved, and the liability of its members to one another ascertained. And the proof to that effect is full and specific. By the decree of the supreme court it is found that the amount for which it is given was a debt, with the interest thereon, due Elliott from Holladay before the commencement of the suit.

Admitting that a mere judgment for money is not evidence of an earlier indebtedness, (Bump, Fraud. Conv. 557,) still it may appear from the findings of the court, or other proceedings in the case anterior to the judgment, how long the indebtedness existed prior thereto.

In *Hinde v. Longworth*, 11 Wheat. 211, which was a controversy between a party claiming under a voluntary deed of March, 1799, and one claiming under a money judgment of August, the same year, against the grantor therein, the court held that while the mere judgment did not show that the plaintiff therein was a creditor prior to the execution of the deed, without which he could not impugn the

same for fraud, (*Sexton v. Wheaton*, 8 Wheat. 242,) that the accounts on which the judgment was founded, and which were in the record, did show that the cause of action arose before the execution of the deed. See, also, *Goodnow v. Smith*, 97 Mass. 69.

The alleged fraudulent conveyances are about 20 in number, and appear to have been made from November, 1875, to April, 1879, while both the allegation and the proof are satisfactory that the indebtedness existed at and prior to November 5, 1869.

The issue of an execution, and the return of *nulla bona* thereon, is considered sufficient evidence of the insolvency of the judgment debtor, and that the judgment creditor is remediless at law. But it is not the only evidence of that fact, nor, in my judgment, always the best. The authorities are in apparent conflict on this question. Wait, Fraud. Conv. § 68; Bump, Fraud. Conv. 518-527. But where the diversity is not the result of local legislation, I think the apparent conflict arises from confounding creditors' bills to subject personal property to the satisfaction of a judgment with an ordinary bill in equity to set aside or postpone a conveyance of real property on which the plaintiff's judgment is, as against his debtor, a lien without an execution. In the latter case the right to maintain the suit is based on the unsatisfied judgment, the fraudulent conveyance, and the insolvency of the debtor; which latter fact may be proved by any competent evidence, as well as a return of *nulla bona* on an execution.

In *Hodges v. S. H. Mining Co.*, 9 Or. 200, it was held, in a suit against a stockholder of a corporation on a corporation debt, that the insolvency of the corporation might be shown as any other fact, without an execution or even a judgment against it.

Terry v. Tubman, 92 U. S. 156, was an action against a stockholder of a bank to recover the amount of certain unredeemed bills of the corporation. The court held that the insolvency of the bank might be shown otherwise than by a judgment and an unsatisfied execution.

Case v. Beauregard, 101 U. S. 688, was a creditors' bill against the members of an insolvent firm. The court said that a judgment and a fruitless execution are not the only evidence that a creditor has exhausted his legal remedy. "They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear."

In *McCalmont v. Lawrence*, 1 Blatchf. 232, Mr. Justice NELSON held that "chancery has jurisdiction, on a bill filed by a judgment creditor for relief against a conveyance of lands by his debtor, made with intent to defeat the judgment lien, or to hinder or delay satisfaction of the judgment, whether execution has been issued thereon or not." See Bump, Fraud. Conv. 523.

The insolvency of Ben Holladay is confessed. The bill alleges that he has no property in Oregon in his own name, and has not had since the date of said decree, out of which the same could be

satisfied by execution or other legal process against him; and that he is insolvent, and unable to pay said decree, except out of the property in question. This allegation is expressly admitted in the answer, except that the defendant says he "has neither knowledge, information, or remembrance sufficient to state whether or not the said Ben Holladay is insolvent, or unable in fact to pay the said decree except out of the property described in the bill of complaint." This allegation of want of knowledge is not evidence, and proves nothing. It is also noticeable that the defendant omits to state, as he should, whether he has any belief on the subject or not. But in his evidence he says, over and over again, that Ben Holladay was a ruined man financially when he left Oregon in the fall of 1877; that during his stay in Washington the following four years he allowed him five or six thousand dollars a year, out of the profits of the mill property, to keep him from starving. But the admission in the answer that Ben Holladay had no property in Oregon out of which said decree could be made by legal process, is sufficient. That is all a return of *nulla bona* on an execution would show, and either is sufficient evidence of insolvency for the purpose of this proceeding. It matters not how much property he may have out of this state, or beyond the process of its courts.

This disposes of the case, except as to the question of fact, did Ben Holladay make the conveyances and transfers in question with intention to hinder and delay his creditors, and did Joseph Holladay receive them with notice of such design, or good reason to believe the same? It is impossible for any unprejudiced mind to give any other than an affirmative answer to this question. It is not necessary to go into the evidence in detail. Suffice it to say that it appears from the defendant's own testimony, and the admitted facts of the case, that in January, 1873, Ben Holladay, being indebted to his brother Joseph in the sum of \$100,000, gave him his note therefor; and on November 1, 1876, gave him another note for \$163,345, in payment of the former note, and interest thereon at 12 per centum per annum, together with a third note for \$4,500, given some time before. These notes have remained in the possession of Joseph Holladay, and no credits have been allowed or indorsed on them, although three valuable parcels of this real property, of not less than \$50,000 in value, and 1,050 shares of the Oregon Transfer Company's stock, worth not less than \$50,000 more, were conveyed and transferred to him between the giving of the first and last note. The real property was lots 1, 7, and 8, in block 47, in Portland, on which the Holladay residence is situated, the place called the Seaside House, and other considerable tracts of land in Clatsop county; and lots 6, 7, and 8, in block 23, in Couch's addition, together with sundry lettered blocks in said addition that were afterwards determined to belong to the Oregon & California Railway Company.

Afterwards, between November 25, 1876, and April, 1879, sundry

conveyances and transfers of property belonging to Ben Holladay were made to the defendant, namely: Shares of stock: 1,195 in the Portland Street Railway Company, 5,331 in the Wallamet Real-estate Company, 675 in the Wallamet Steam-mills Lumber & Manufacturing Company; furniture and stores at the Holladay residence; furniture, stock, and farming implements at the Seaside House; the undivided half of the furniture in the Clarendon Hotel; Sam Smith's notes for over \$11,000, secured by mortgage on lot 2, in block 47; mortgage on the Simpson farm, in Polk county, —afterwards foreclosed and bought in; the undivided $\frac{1}{2}$ of the S. $\frac{1}{2}$ of block 23, in Couch's addition, (April, 1877,) on which was built the Clarendon Hotel; blocks 20 and 37, in Wheeler's addition to East Portland; the Cornelius farm, in Washington county; and 9,995 shares of the stock of the Oregon Real-estate Company.

The defendant contends that he did not receive this last stock from Ben Holladay, but that he bought it from the Bank of California for \$34,000, to whom the former had pledged it as collateral security for a loan of probably not less than \$25,000. But the fact is admitted that the payment was made out of moneys derived from the property and business transferred to him by his brother, and mainly out of the earnings of the transfer company. The plaintiff alleges that this property, when conveyed to the defendant, was worth \$225,000, and was worth at the commencement of this suit \$500,000. In his answer the defendant says the property was not worth over \$100,000 when he received it, and that it is now not worth over \$400,000. My conclusion is that the allegation in the bill on this point is substantially correct.

Nothing passed between the brothers at the time these conveyances were made as to their purpose or object. Joseph never asked for any of them, and Ben never told him why he made them. And the only conversation that ever passed between them on the subject, according to the former's testimony, is that, as his brother was about to leave the state in the fall of 1877, he went to his house, when the former said to him, without solicitation or explanation: "All this property belongs to you, and no power on earth can take it away from you." And he insists that he received it silently, but in "good faith," in payment of the debt then due him. The various properties remained in the hands and under the management of the persons in charge before the transfers were made, and the rents and profits of the mill and hotel, so far as they could be spared from the payment of debts, charges, and taxes, were largely transmitted to Ben Holladay, at Washington.

The defendant admits that he consented that the manager of the mill, Mr. George Weidler, might send his brother five or six thousand dollars a year to keep him from starving while in Washington prosecuting his Indian spoliation claim; and says that he has since learned that Weidler let him have not less than \$75,000 during this time,

without his knowledge. And the fact appears to be, as this statement tends to show, that Joseph Holladay was a mere figure-head for this property, and knew very little about its management or condition. Ben Holladay's actual and trusted representative was Weidler, who managed his affairs, using Joseph Holladay's name as ostensible owner whenever necessary.

In the spring of 1879 the defendant was in Washington, and, being in need of money, applied to his brother for \$1,000, which was refused for want of means. Thereupon he wrote Ben Holladay a letter, which is in evidence. After stating the request and refusal, he writes in substance: "You have just made \$15,000 on the sale of O. & C. bonds, and yet refuse me \$1,000, when you know I have not a dollar on earth, but have let you have every dollar I had on earth fifteen years ago." When the decree was given in the supreme court in favor of Elliott in 1879, the personal property at the Seaside House, and in the Holladay residence, was immediately transferred to the defendant by the agent of Ben Holladay, to prevent its seizure on execution. When the bills of sale were presented to him he appeared to apprehend the purpose of the transaction, and said it was no use,—the judgment would hold the property; but, on being assured by the agent, on the authority of a prominent lawyer, that nothing but an execution would prevent the transfer of personal property, he acquiesced and took the bills.

And lastly, in his answer in *Holladay v. Holladay*, which appears from the evidence to be a suit to have these conveyances, which are absolute in form, declared to be mortgages, the defendant swore that these conveyances were delivered to him "secretly and fraudulently" by Ben Holladay, "with the fraudulent intent" on his part "to cover up and conceal from his creditors" said property, and "in the fraudulent hope and expectation" that the defendant "would support him therefrom, and would fraudulently join and assist him in purchasing from his creditors their said claims and debts for a small percentage of their face value, and force them to compromise the same, and would thereafter reconvey the remainder of the property to him;" and for fear the creditors of Ben Holladay might have the defendant examined on oath concerning said conveyances, "said understanding and expectations were not put in the form of words or in writing," but Ben Holladay "verbally said to the defendant, in November, 1877, and divers other times, that said lands and personal property belonged to and were the property of this defendant." This is a full and frank confession of the fraudulent intent of the grantor in these conveyances, and the knowledge and acquiescence, if not the active participation, of the defendant therein.

After a careful consideration of all the facts, in my judgment, the best construction that can be put on these transactions is this: The conveyances and transfers were made by Ben Holladay to Joseph Holladay, not in payment or satisfaction of his debt, but to secure it

for the time being, and until there was a change for the better in his circumstances, which he probably hoped might soon come through the action of congress on his Indian spoliation claim; and, in the mean time, to thereby prevent and delay his other creditors from collecting their debts at what he might consider a sacrifice of a large property, which, in the near future, would greatly enhance in value. However, the law of the case is clear. The conveyances are void as to existing creditors, both as to the grantor and grantee.

Section 51 of chapter 6, (Laws Or. 523,) which is substantially chapter 5 of 13 Eliz., provides, among other things, that every conveyance of any estate in lands, or goods or things in action, "made with intent to hinder, delay, or defraud creditors, or other persons, of their lawful * * * debts or demands, * * * as against the persons so hindered, delayed, or defrauded, shall be void." It is not necessary that the grantee in a deed made to hinder or delay creditors should have actual knowledge of the debtor's intent to make it void. A knowledge of facts sufficient to excite the suspicions of a prudent man, and put him on inquiry, amounts to notice, and is equivalent, in contemplation of law, to actual knowledge, and makes the grantee a party to the wrong. *Clements v. Moore*, 6 Wall. 312; *Bartles v. Gibson*, 17 Fed. Rep. 293; Bump, Fraud. Conv. 200. And the grantee in such a conveyance cannot avoid the effect of these criminative circumstances by insisting that he acted in good faith,—*res ipsa loquitor*; for good faith, in such case, cannot co-exist with notice of the wrongful intent of the grantor.

The conveyances of real property being void as to the plaintiff, he is entitled to have them so declared and set aside, so far as may be necessary to collect thereout the judgment against Ben Holladay; and it is so ordered. The plaintiff is also entitled to costs against the defendants Elliott and Joseph Holladay; but whether they shall be taxed against them *in solido* or severally, and, if the latter, for what amounts, and whether the decree shall leave the plaintiff to enforce his decree by execution from the state court, or by the process and under the direction of this court, will be determined at the settlement of the decree, on which counsel may be heard.

NOTE.

1. CHAMPERTY. Champerty is an aggravated species of maintenance. *McIntyre v. Thompson*, 10 Fed. Rep. 532.

A mere agreement for a contingent fee is not champertous. To constitute champerty there must be an agreement on the part of the champertor to carry on the party's suit at his own expense, as well as for a share of the thing or money to be received. *Jewel v. Neidy*, (Iowa,) 16 N. W. Rep. 141.

Agreement to prosecute a claim for a stipulated amount of the proceeds, with full power to compromise as shall be thought best, is not a champertous agreement. *Jeffries v. Mutual Life Ins. Co. of N. Y.*, 4 Sup. Ct. Rep. 8.

In *Vimont v. Chicago & N. W. Ry. Co.*, (Iowa,) 21 N. W. Rep. 9, J., who was injured by the negligence of defendant railroad company, assigned his claim for damages to V., and V. executed the following agreement: "In consideration of the assignment to me by J. of his claim for damages against the Chicago & Northwestern Railway Company, resulting to him by reason of an injury received by him on or about the thirty-first day of August, 1881, on said railway, I hereby agree to dispose of the entire amount

realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advances of money I may make, I am to retain thereof the sum of fifty dollars; I am also to retain all sums of money that I may advance in the prosecution of said claim; next, I agree to pay out of the proceeds of said recovery the reasonable fee of the attorneys and agents employed to prosecute said claim, or such fee therefor as may be agreed upon, if any agreement for a specific amount shall be agreed upon, and the balance of said recovery I agree to pay to the said J." It was held that the cause of action was assignable; that the assignment and agreement did not constitute barratry, champerty, or maintenance; and that V. was entitled to maintain an action for damages against the railway company in his own name.

A contract between an attorney and his client that the attorney shall prosecute a claim at his own cost, for a share of the recovery, is champertous and illegal. *Martin v. Clarke*, 8 R. I. 389.

Where an attorney was employed to bring an action, the client agreeing to give or allow and pay him the first \$50 collected by him therein, held not champertous. *Scott v. Harmon*, 109 Mass. 237.

An agreement by which a defendant in attachment assigns to his attorney the property attached, in consideration of his services in the suit, and in prosecuting a contemplated action of damages on account of the attachment, stipulating for his own diligence in the attachment suit, and giving the attorney the entire management and control, is not void for champerty or maintenance. *Ware's Adm'r v. Russell*, 70 Ala. 174.

In *Stanton v. Haskin*, 1 McArthur, 558, R. & S., attorneys at law, agreed to conduct a suit in chancery for the recovery of lands claimed by H. and wife, who agreed to give them one-third of whatever land or money might be received. A decree was obtained in favor of H. and wife for the lands, and also for the rents and profits. In a suit to enforce the agreement for an undivided third of the land so recovered, the court held that the contract was champertous and therefore void.

The New York Code contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and where the latter, by officious interference, procures the suit to be brought, and obtained a retainer in it. *Fowler v. Callan*, (N. Y.) 7 N. E. Rep. 169.

For a full discussion of the general subject of champerty, see *Courtright v. Burnes*, 13 Fed. Rep. 317, and note by Judge SEYMOUR D. THOMPSON, 323-329.

2. FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE. For an exhaustive discussion of the question of fraudulent conveyance, and therein of the knowledge of the grantee, see *Platt v. Schreyer*, 25 Fed. Rep. 83, and note, 87-94.

FLINT v. COUNTY COM'RS REPUBLIC CO.

(Circuit Court, D. Kansas. 1886.

1. TAXATION—VOID SALES—ACTION TO RECOVER MONEY PAID—PLEADINGS.

Under Kansas tax laws of 1868, § 120, a party seeking to recover from the county money paid at tax sales, the tax title having failed, must show return of tax certificates, or an offer to return them, before suit brought.

2. SAME—LIABILITY OF COUNTIES—RETURN OF CERTIFICATES.

Counties are entitled to the actual return and surrender of certificates issued at illegal tax sales, before being called upon to refund money paid them on such sales.

Action by holder of tax certificates to recover purchase money on failure of tax title, land not having been liable to taxation at time of sale. Defendants demur.

F. M. Clark, for plaintiff.

T. M. Noble, for defendants.

BREWER, J. The demurrer must be sustained. The defendant is under no obligation to return taxes upon failure of tax titles, except

as some statute requires it. *Commissioners Lyon Co. v. Goddard*, 22 Kan. 389. Before the county can be held liable, default on the part of the treasurer must be alleged, or some interference with him by the commissioners. *Commissioners Saline Co. v. Geis*, 22 Kan. 381. The plaintiff must rely on section 120 of the tax laws of 1868, for without that the statute of limitations would plainly bar. This provides that if the county clerk discovers that the land ought not to be conveyed, he shall not convey it; and also that the county treasurer shall, on the return of the tax certificate, refund the tax money. This petition does not allege when, if ever, the county clerk discovered that the land ought not to be conveyed, or that the tax certificate was ever returned, or offered to be returned. Whether the first matter is a fatal defect need not be determined. The second is vital. Perhaps the failure to return was one of the reasons why the treasurer refused to pay, and the commissioners to make any provision for payment. The lack of funds is not shown to be the only reason for refusal. Only inferentially does it appear that any demand was ever made on the treasurer; the demand is alleged to have been made upon the county.

Leave is given to file an amended petition, with leave to answer.

SCHULER v. ISRAEL and another. (Consolidated Cases.)¹

(Circuit Court, E. D. Missouri. June 22, 1886.)

1. JUDGMENTS—NOTES.

Where judgment is recovered on a note, it is merged and extinguished, and a second judgment cannot be recovered thereon against the same party, in another district.

2. CHECKS—DECREE AGAINST BANK.

The drawer of a dishonored check is not entitled to be credited with the amount of an unpaid decree recovered by the payee against the drawee.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—SALES ON CREDIT.

A general assignment for the benefit of creditors, directing the assignee to dispose of the property conveyed with all reasonable diligence, "by public or private sale, for the best price that can be obtained, and convert the same into money," *held*, not to authorize sales on credit.

4. SAME—CONFLICT OF LAWS.

An assignment valid where executed, is valid in other states, if not in conflict with the rights of creditors residing therein.²

At Law. Consolidated cases.

Suits on check drawn and note made by J. N. Israel in the name of C. W. Israel & Co. Demurrers to answers of Israel and the Laclede Bank, garnishee.

The facts, as they appear from the pleadings, are substantially as follows: At the time of the transactions here involved, J. N. Israel

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

²See note at end of case.

did a banking business at Hamilton, Texas, under the name of C. W. Israel & Co., and at Harold and Wichita Falls, Texas, under the name of the Exchange Bank. Each of his three banks had a separate account with the Laclede Bank of St. Louis, Missouri. On October 20, 1885, the amounts held by the Laclede Bank to the credit of Israel's banks were, respectively, as follows: To the credit of C. W. Israel & Co., \$12,412.41; to the credit of Exchange Bank of Harold, \$1,927.53; to the credit of the Exchange Bank of Wichita Falls, \$10,013.15. On that day the check in suit was drawn on the Laclede Bank, in favor of the plaintiff, for \$11,250. On October 24, 1885, Israel & Co., being insolvent, made a general assignment, which provided, among other things, that the assignee therein named should, "with all reasonable diligence, dispose of said property herein conveyed, by public or private sale, for the best price that can be obtained, and convert the same into money;" and that "it is understood that this assignment is made for the benefit of only such creditors of the said C. W. Israel & Co. as will and do consent to accept their proportional shares of said estate, and discharge said C. W. Israel & Co." On the same day C. W. Israel & Co. telegraphed the Laclede Bank as follows: "We assigned this day in favor of S. Davidson. Hold funds subject to his order." The Laclede Bank held a note executed in the name of C. W. Israel & Co., for \$6,500, which matured October 26, 1885. When it fell due it was charged up to C. W. Israel & Co.'s account, leaving a balance to the credit of Israel & Co. of \$5,912.41. The check above mentioned was not presented for payment until October 26, 1885, after the bank had debited Israel & Co.'s account with the \$6,500 note, and was refused payment because of lack of funds. The accounts of J. N. Israel's other two banks remained unaltered at the time the check was presented. The defense of J. N. Israel as to the note in suit is that, before the commencement of this suit, suit had been brought on said note in the United States circuit court of Texas, and that judgment has been recovered thereon in that suit, and said note merged in the judgment, and extinguished. He acknowledges the execution of the check, but claims that inasmuch as in the suit in equity on said check, by the present plaintiff against the Laclede Bank, in this court, said plaintiff recovered a decree against the bank for \$5,912.41, said sum should be credited on the check. It appears, however, that nothing has been collected on said decree. The plaintiff is a resident of Kansas.

Dyer, Lee & Ellis, for plaintiff.

Boyle, Adams & McKeighan, for defendants.

BREWER, J. As counsel desire a speedy decision, that judgment may be entered the present term, and the cases taken, together with the equity cases heretofore decided by me, (*Schuler v. Laclede Bank*, 27 Fed. Rep. 424,) together to the supreme court, I simply state my conclusions:

1. Judgment having been rendered in the United States circuit court for the Eastern district of Texas on the note sued on, no judgment can be entered here upon the same cause of action. *Freem. Judgm.* § 221, and cases cited.

2. No objection being raised, personal judgment will go on the check.

3. The assignment is valid under the laws of Texas. Unlike the assignment in the case of *Muller v. Norton*, 19 Fed. Rep. 719, this does not authorize sales on credit. It directs the assignee to dispose of the property with all reasonable diligence, and to convert the same into money.

4. Valid in Texas, where it was executed, it must be considered valid here, save as it conflicts with the rights of resident creditors. *Burrill, Assignm.* (3d Ed.) § 310, and cases cited.

Judgment will therefore go in favor of plaintiff against Israel for amount of check and interest, and the Laclede Bank will be discharged, with costs, and allowance as stipulated.

NOTE.

In the recent case, *In re Waite*, (N. Y.) 2 N. E. Rep. 440, the New York Court of Appeals laid down the following rules as to the status of foreign assignees in bankruptcy in the courts of this country: (1) The statutes of foreign states can in no case have any force or effect *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations allows a certain effect here to titles derived under, and powers created by, the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here, when they can be without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes: provided, also, that such titles are not in conflict with the laws or the public policy of our state. (3) Such foreign assignee can appear, and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt.

A voluntary general assignment for the benefit of creditors, made in another state, and valid by its laws, will be recognized as valid and as effectually transferring personal property wherever the same may be situated. *In re Page-Sexsmith Lumber Co.*, (Minn.) 16 N. W. Rep. 700; *Butler v. Wendell*, (Mich.) 23 N. W. Rep. 460. But see *Richardson v. Rogers*, (Mich.) 8 N. W. Rep. 526.

An assignment of personal property and choses in action by an insolvent debtor for the benefit of creditors in conformity with the laws of New York, where such debtor resided and did business, operates to transfer the right of action to recover said choses in action to the assignee, and he may maintain an action, as such assignee, in the courts of this state, to collect the same, in the absence of any set-off or other defense to such action, or of any lien or charge against such claim. *Fuller v. Steiglitz*, 27 Ohio St. 355.

A general assignment for the benefit of creditors, made in another state, is valid in Maine, so far as to protect the assigned real estate situated in Maine from attachment by a non-resident creditor who has assented to the assignment, and received a part of the benefits thereby secured to him. *Chafee v. Fourth Nat. Bank of N. Y.*, 71 Me. 514.

In *Faulkner v. Hyman*, (Mass.) 6 N. E. Rep. 849, it is said that an assignment for the benefit of creditors, executed by a citizen of New York to another citizen of that state, and which includes certain property situated in Massachusetts will not be enforced by the courts of that commonwealth, to affect the rights of parties resident there, who have not assented to the assignment, and who have made an attachment of the property here situate subsequent to the assignment in New York.

A deed of assignment between residents of another state, valid according to the laws of the state where executed, is valid as to personal property in Kentucky. *J. M. Ather-ton Co. v. Ives*, 20 Fed. Rep. 894.

UNITED STATES *v.* SMITH.¹

(*District Court, W. D. North Carolina. April 5, 1886.*)

INTERNAL REVENUE — VIOLATION OF LAWS — WILLFUL REMOVAL OF SPIRITS — INTENT.

In an indictment under Rev. St. § 3296, for the removal and concealment of spirits, where defendant pleaded that the spirits had been removed from the designated place of deposit to an adjoining smoke-room, with purpose of preventing waste from leakage, and not with the intent of defrauding the government, the jury are justified in acquitting, if they find that the act of removal was not willful, in the sense not only of voluntary, but also with a bad purpose.

This was an indictment, tried at April term, 1886, of the district court of the United States, Western district of North Carolina, at Greensboro, North Carolina, Hon. ROBERT P. DICK, D. J., presiding. The defendant was charged in two counts in a bill under section 3296, Rev. St. In the first count, after formal parts: "The said Frederick Smith, late of said district, laborer, did unlawfully and willfully remove one cask of distilled spirits, on which the tax had not been paid as required by law, to a place other than a distillery warehouse provided by law, contrary to the form," etc. And in the second count, after formal parts: "The said Frederick Smith, late of said district, laborer, did unlawfully and willfully conceal one cask of distilled spirits, removed to a place other than a distillery warehouse provided by law, and on which the tax had not been paid, contrary to the form," etc. The defendant pleaded not guilty, and a jury trial was had.

It appeared in the evidence that the defendant was a registered distiller of brandy from fruit, in the Fifth collection district of North Carolina; that about the first of December, 1885, an internal revenue agent (Kellogg) accompanied by a deputy collector, visited defendant's place of business, and examined his distillery book, Form 25½, and also his designated place of deposit, and there were not enough spirits in the place of deposit to fulfill the *quantum* shown by the book to have been distilled. The agent asked defendant where the balance of his brandy was, and defendant replied, pointing to a small out-house, "In there." Thereupon the officers examined the outhouse, and found therein three unstamped packages, containing 150 gallons of brandy. It was further in evidence that the said outhouse was built of logs, was undaubed, and that its contents were exposed to view from the outside; that the same stood about 11 feet from the legal place of deposit; that defendant had before this used it for depositing some of his brandy when the regular place was full, or when it became necessary to prevent waste or

¹ Reported by James E. Boyd, (late U. S. Atty. for Western district of North Carolina.) of the Greensboro, N. C., bar.

leakage, and that this had been done with the knowledge and consent of the internal revenue officers; that the designated place of deposit at the time referred to in December, 1885, was about full; and defendant testified that he had removed the three packages therefrom, and placed them in the outhouse for safe-keeping, and in order that he might have convenient access to the packages left in the place of deposit, and prevent leakage, etc.

The following authorities were cited and commented upon in the argument of the case: *State v. Gilbert*, 87 N. C. 527; *State v. White-ner*, 93 N. C. 590; *State v. Harrison*, Id. 605; *Felton v. U. S.*, 96 U. S. 699; *State v. Barbee*, 92 N. C. 820; *U. S. v. Kirby*, 7 Wall. 482; *Lillienthal's Tobacco v. U. S.*, 97 U. S. 237; *State v. King*, 86 N. C. 603; *U. S. v. Ulrici*, 12 Myers, Fed. Dec. 666; *U. S. v. Three Railroad Cars*, Id. 562.

H. C. Jones, U. S. Atty., for the United States.

James E. Boyd, for defendant.

After the close of the argument, his honor, Judge DICK, delivered the following charge to the jury:

Gentlemen of the Jury:

When the testimony was closed in this case, I requested the counsel to make as careful an examination of legal authorities as they could during the recess of the court, and submit to me arguments upon the questions of law involved. You have heard the legal arguments, and also arguments upon the matters of fact presented by the evidence, and you are now prepared to receive the instructions of the court upon the material questions of law so fully discussed.

I will not recapitulate the testimony, as there is not much conflict, but leave all questions of fact entirely to your determination. The law is a system composed of maxims, rules, and principles which have been devised and adopted for the purpose of securing and regulating business transactions, social relations, and political order among men. The elements of the law are founded in reason and natural justice, and are the outgrowth of human experience, knowledge, and wisdom, developed in the course of ages. It has been well said that "the reason of the law is the life of the law." Justice is the spirit of the law, and Christian civilization has adorned it with many principles of humanity and benevolence.

I will briefly consider and explain some of the familiar general rules of the law which have been referred to in the course of the argument of counsel.

In all trials for crime the prosecution must prove, beyond a reasonable doubt, the truth of every fact essential, in point of law, to constitute the offense charged in the indictment. This rule has long existed, and is founded in natural justice and humanity; as all good and just men feel that, when such a doubt exists, it is better for the welfare of society to acquit than to condemn. Every person accused

of crime in a court of justice is presumed in law to be innocent until the accusation is proved, to the satisfaction of an impartial jury, beyond a reasonable doubt. The law imputes innocence and honesty, rather than wrong and fraud, in the conduct of men; and affords the benefit of such presumption to every person accused of crime or fraud until the contrary is satisfactorily proved by the accuser. "It is a principle of natural justice, and of our law, that the intention and the act must both concur to constitute crime." There can be no crime when there is no criminal intention. An act does not make the actor guilty unless his intent was criminal. This wise, just, and reasonable rule is firmly settled in the common law; is widely known and approved among men; and is recognized and observed in every enlightened system of jurisprudence.

When a criminal act is knowingly and *willfully* committed, the law presumes a criminal intent, and the offender is responsible for all the natural and probable consequences which ensue from the unlawful act, although such results were not contemplated. No person can be excused from the *willful* commission of an unlawful act upon the ground that he was ignorant of the law that he had violated. Every person of ordinary discretion is presumed to know the law of the country in which he resides. The strict application of this legal presumption is necessary to secure the peace and good order of society, and it is not unreasonable when applied to crimes at the common law, which are generally *mala in se*,—wrong in themselves; for the consciences of men teach them the natural principles of social obligation and duty. Social and political necessity and experience have induced legislatures to enact statutes imposing more stringent duties and obligations upon citizens than were known to the common law. Whenever a statute positively forbids an act, the doing of such act *willfully*, or from culpable negligence, is an indictable crime. A *willful* act is one that is done, not only voluntarily, but for a bad purpose. When such purpose is shown by the evidence, the law implies a criminal intent. The accused cannot say, by way of defense, that he did not know the law, and did not intend to violate it. When an act forbidden by law is knowingly done, but not with a bad purpose, the presumption of criminal intent is only *prima facie*, and the accused may show that he did not act from an evil motive, and may claim the benefit of the presumption of innocence and the doctrine of a reasonable doubt.

It is often said that the presumption of "legal knowledge" is a positive rule of law, and applies to all cases where acts are knowingly done which are expressly forbidden by law, and gives rise to a *conclusive* presumption of criminal intent. If the word "conclusive," in this connection, means "irrebuttable," then such presumption is very unreasonable when applied to all criminal charges, and is not justified to that extent of meaning by any considerations of public policy. No man knows all the law. Judges differ in their legal decisions, and

lawyers are continually discussing in the courts doubtful and controverted questions of law. Long years of study and practice enable men to acquire considerable legal learning, but their knowledge of the law is by no means universal. The law is a growing science, and is continually expanding to meet the wants and necessities of a rapidly advancing civilization. Legislatures are frequently changing the common and statute law by new statutes, which often require judicial interpretation and construction. Prudent lawyers, in trying cases involving important questions of law, diligently and laboriously seek for and examine authorities, and judges are always pleased to hear carefully prepared arguments before they deliver maturely considered opinions deciding cases before them.

The presumption of "legal knowledge" is a general rule, and not accurately defined as to the extent of its application. I do not regard it as a positive rule of law, but as a very strong presumption, subject to some reasonable qualifications in criminal trials, where the life and liberty of the citizen are involved. In such cases the law should be liberally construed, so as to give effect to all of its beneficent provisions, to avoid conflict of rules of law, and secure the citizen against anything that would be unjust or oppressive. The beneficent presumption of innocence, and the doctrine of a reasonable doubt,—so important in the trial by jury,—would be of little benefit to a person on trial for crime, if the mere proof of an unlawful act knowingly committed by him was received in a court of justice as conclusive evidence of guilt. He would be convicted without any opportunity of explanation and defense, and without any of the benefits of a trial by jury, secured by the constitution of the United States. A trial by jury, in some instances, would be a mockery of justice, if a person accused should be convicted by a *conclusive* presumption of law. It is well settled that a *prima facie* case made by the prosecution does not take away the presumption of innocence from the accused, or deprive him of the benefit of a reasonable doubt in the minds of the jury.

In civil matters there are many irrebuttable presumptions, and there are some as to the incapacity of persons for committing crime. In some text-books and judicial decisions the doctrine is broadly stated that a presumption of knowledge of the law is in all cases irrebuttable, and conclusively establishes a criminal intent. This extreme extension of the rule is unreasonable, and, as to criminal intent, should be restricted to cases where the inference of criminal intent *necessarily* arises from the facts in evidence, and should not extend to offenses where a particular and specific intention is essential to constitute the crime charged.

As a general rule, I think the legal effect of presumptions as to criminal intent is to throw upon the accused the *onus* of justifying or explaining the acts from which the law infers a criminal intent. It is a rule founded in natural justice, and as old as the law,—both hu-

man and divine,—that no person shall be condemned without being heard in explanation of his conduct. Presumptions could never have been adopted as a means of proof before a jury if their nature and force could not be estimated by men of plain and ordinary sense and discretion. On this subject, I think the rule of law stated by a very eminent English judge is reasonable, and generally applicable:

“When an act, in itself indifferent, if done with a particular intent, becomes criminal, then the intent must be proved and found by the jury; but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent.”

In trials for crime, I think, the rule of law that a criminal intent must concur with an unlawful act in order to constitute crime is one of the fundamental principles of public justice, almost universal in its application. When an act in itself unlawful is proved to be knowingly done, no further proof is necessary on the part of the prosecution to obtain a conviction, as the law presumes the criminal intent, but it is not so conclusively presumed as not to admit of an explanation. If an act forbidden by law is knowingly and *willfully* done, and the accused has no other defense except his ignorance of the law, then the presumption of criminal intent is not rebutted.

As a general rule, a man's motives and objects must be inferred from his conduct; and, when his acts are sufficient to indicate a guilty intention, he is entitled to show in evidence the facts and circumstances which preceded the act, or were parts of the transaction, so that his whole conduct may be passed upon by a jury who are impartial, and conversant in human affairs, and whose common sense and experience enables them to judge of the connection between conduct and intention. Where an act which in itself is innocent, becomes an offense only because it is forbidden by a statute, the spirit and purpose of such statute should be considered, and a person who does the forbidden act ought not to be convicted by a jury unless they are satisfied that he did the act with a purpose to evade the provisions of the statute. The reason and object of the law in such cases should prevail over its letter.

In the section of the statute on which this indictment is founded the words “unlawfully and willfully” are not used in specifying the act forbidden, and, upon a strict construction, the doing of such act is indictable, and the law infers the criminal intent. The indictment would have been sufficient if the language of the statute had been literally used in charging the offense committed; but the defendant would still have had the right to rebut the presumption of a criminal intent implied by law, by evidence of facts and circumstances surrounding the transaction. The defendant must have had the purpose of defrauding the government of its revenue before he can be rightfully convicted of crime. The words “unlawfully and willfully” are used in the indictment in characterizing the offense

charged, and in averring the intent with which the act was committed, and I think that you must be satisfied that the removal of the brandy was "willful" before you find the defendant guilty.

The district attorney insisted that the words "unlawfully and willfully" are the words ordinarily found in the precedents, and, for the sake of conformity, ought to be used in an indictment of this kind, and, in their signification, are equivalent to "unlawfully and on purpose," and are only intended to aver that an unlawful act was done "intentionally." The district attorney asked me to charge you that there is no evidence that the defendant was constrained by any one, or by circumstances, to remove the brandy from the distillery to the smoke-house, and therefore he did the removing purposely. I decline to give the charge requested, and I leave the evidence of the facts and circumstances surrounding the transaction to be considered by you.

As to the signification of the word "willfully," when used in a statute creating a criminal offense, our state supreme court, in a recent case, (*State v. Whitener*, 93 N. C. 592,) gives a definition of the word substantially like one that is approved by the supreme court of the United States. "The word 'willfully,' in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose." *Felton v. U. S.*, 96 U. S. 699.

The defendant in his testimony said that he has been a duly-authorized brandy distiller for nearly 20 years, and that he was advised by a collector of the district, many years ago, that the government did not require him to pay more taxes than those assessed on the registered capacity of his distillery; and that he had acted on this instruction with the knowledge of the revenue officers. It was the duty of the defendant to render an account and pay taxes on all the liquors that he manufactured, and his failure to perform such duty was not justified by the instructions received from the collector, as he acted without legal authority. Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity.

The defendant further testified that he placed the three barrels of brandy in the smoke-house, not with the object of concealing the same, but for the purpose of conveniently reaching them in case of leakage; that his designated place of deposit was small, and crowded with barrels and kegs; that he had often lost brandy from leakage; that the smoke-house was built of logs, and the cracks were open, and the building was only 11 feet distant from the designated place of deposit; and was not adapted for concealment. As a distiller of brandy the defendant was exempted from many of the strict regulations imposed by law on distillers of grain. He was allowed to select his place of deposit, and, when designated, it was under his keeping.

You can consider the testimony of the defendant, together with the evidence as to his conduct and declarations at the time the brandy

was seized by the revenue agent, and all the other facts and circumstances testified to by the government witnesses. If you are satisfied that the barrels of brandy were placed in the smoke-house with the honest purpose of preventing waste from leakage, and not with the intent of defrauding the government, then you would be justified in finding that the act of removal was not *willful*. In making the inquiry as to the object and purpose of the defendant, you should consider the evidence of his good character, and give it such weight as you think it entitled to under the circumstances of the case. If you believe from the evidence that he placed the three barrels of brandy in the smoke-house with the intent of defrauding the government of revenue, then you will find him guilty. But if you are of opinion, after considering all the facts and circumstances surrounding the transaction, that he had no such willful purpose, or you have a reasonable doubt about the matter, then your verdict should be "Not guilty."

The jury, after a short deliberation, returned a verdict of "Not guilty," and the defendant was discharged.

NOTE BY THE JUDGE.

On the day after the trial of this case the district attorney called my attention to the case of *State v. Simpson*, 73 N. C. 269, as an authority sustaining the views which he presented in his argument as to the propriety and necessity of using the words "unlawfully and willfully" in the indictment, and as to the legal signification of such words. Upon these points the case fully sustains his views, and is adverse to my charge to the jury. I think, however, that the case sustains the opinion which I expressed as to the nature, force, and effect of statutes creating offenses, upon the question of criminal intent. The indictment in that case was founded upon a state statute, which in general terms made certain acts a misdemeanor, without saying that such acts must be unlawfully and willfully done to constitute the offense. The indictment in describing the offense used the general words of the statute, and it was held to be defective, because it did not allege that the act was done "unlawfully and willfully." The court says, in substance, that it is apparent, from the nature of things, and the dictates of common sense and natural justice, that the general words of the statute are too broad, and go beyond the meaning of the law-makers; and must be qualified in construction by the use of the words "unlawfully and willfully," or by words of equivalent import. "In our case the indictment does not contain such words as ought to have been used in the statute, if the legislators had correctly expressed therein their precise meaning; and it was necessary for the indictment to aid the want of accuracy by adding the words necessary to express the meaning of the statute, and to qualify the general words used."

Since delivering my charge to the jury in this case, a few days ago, I have carefully considered the section (3296) of the Revised Statutes upon which the indictment was founded, in connection with other sections of the internal revenue laws, and in the light of the common law, and feel that I was justified in inferring that it was the intention of congress to create a criminal offense by such section only when the forbidden act was done with a *willful* purpose to defraud the government of revenue, and such purpose is

an essential element of the offense. The regulations and requirements of the internal revenue laws are very strict and positive, and constitute a complicated system of duties and arrangements, which cannot be easily and accurately comprehended by persons of ordinary intelligence and experience, and mistakes will often be made by persons who undertake to carry on business in conformity with such laws. The penalties and punishments for non-compliance with such laws are very severe, and I cannot suppose that congress intended that a jury should convict any person whom they believed to be innocent of any criminal purpose in doing a forbidden act, and of whose guilt there was any reasonable doubt. Congress has the power to change the principles of the common law by a statute, but I believe that when a material departure from long-established principles of justice is intended, such change will be made in plain and unmistakable words; and a court of justice is not warranted in inferring such intentions from the perhaps inadvertent or accidental omission in a statute of a word or words which at the common law are material in the description of a crime, and which are ordinarily used in statutes creating criminal offenses.

CARTE v. EVANS and others.

(Circuit Court, D. Massachusetts. June 21, 1886.)

1. COPYRIGHT—TRANSFER—RIGHTS OF ALIEN ASSIGNEE—INFRINGEMENT.

Where a piano-forte arrangement of the orchestral score of an opera was made by a United States citizen, with the consent of the non-resident foreign composers of the opera, and then transferred by him to a fellow-citizen, who procured a copyright, which he assigned to a non-resident foreigner, acting as agent of the original composers of the opera, *held*, that there was nothing of evasion or violation of law, and that the assignee was entitled to the protection of the court against infringers.

2. SAME—VALIDITY—REGISTRATION—TITLE OF BOOK.

If the published title of a book is sufficient to identify it with substantial certainty with the registered copyright, the copyright will not be forfeited on account of slight variations between the two.

In Equity.

Causten Browne, for complainant.

Prentiss Cummings, for defendants.

NELSON, J. This case was heard in February last, but the decision has been delayed to enable the parties to complete certain proofs which were found to be necessary for its proper determination, and it is only recently that it has been in a condition to be finally disposed of. The suit is a bill in equity for an injunction to restrain the infringement by the defendants of the plaintiff's copyright in an arrangement or adaptation for the piano-forte of the orchestral score of an opera called "The Mikado, or The Town of Titipu." It appeared that William S. Gilbert and Sir Arthur Sullivan, both British subjects resident in London, were the authors and composers of a comic opera entitled "The Mikado, or The Town of Titipu," the words of the opera

being the work of Gilbert, and the musical parts being composed by Sullivan. It was admitted that the orchestral score of the opera has always remained in manuscript, or in print only for the use of the performers, and has never been published, either in this country or in England. The piano-forte arrangement for which the plaintiff holds a copyright was composed by George Lowell Tracy, a professional composer and arranger of music, residing in Boston, and a citizen of the United States. The work of composition was performed by Tracy, in London, under an agreement made by him with Gilbert and Sullivan, and with the plaintiff, who is the representative of their interests in this country, the latter being also a British subject resident in London, that a copyright of the piano-forte arrangement, when completed, should be taken out in this country by Tracy, and transferred to the plaintiff. For his part of the work Tracy was paid a salary. After the completion of the work, with the consent of Tracy and the plaintiff, a copyright was taken out here in the name of Alexander P. Browne, a resident of Boston, and a citizen of the United States, acting as the attorney for all the parties, and was afterwards, with Tracy's approval, assigned by Browne to the plaintiff. The original orchestral score, as composed by Sullivan, was, of course, designed to be played by numerous performers, and on a great number and variety of musical instruments, ranging in compass from the highest to the lowest; and Tracy's work consisted in reducing, condensing, and reconstructing a score composed for a full orchestra of wind and stringed instruments, and producing from it a score that could be played by a single performer on an instrument of the limited capacity of the piano-forte. The Tracy arrangement was intended to be played as an accompaniment to the vocal score, and in that respect to take the place of the orchestral score, as played when the opera was given on the stage.

That an arrangement for the piano-forte of the orchestral score of an opera, such as Tracy has produced, is an original musical composition, within the meaning of the copyright law, is well settled. In executing such a work the ideas of the composer of the opera cannot be wholly reproduced, and other ideas, more or less resembling them, or wholly new, have to be substituted and added. To do such a work acceptably requires musical taste and skill of a high order, and a thorough knowledge of the art of musical composition, and especially of instrumentation. No two arrangers, acting independently, and working from the same original, would do the work in the same way, or would be likely to produce the same results, except so far as they might both resemble the original. An arrangement of this character would undoubtedly be a piracy of the original opera, unless the arranger has in some way acquired the right to make such use of the original; but if he has acquired that right, the arrangement is substantially a new and distinct composition, and as such is entitled to the protection of the court. *Wood v. Boosey*, L. R. 2 Q. B. 340;

affirmed, L. R. 3 Q. B. 223; *Boosey v. Fairlie*, 7 Ch. Div. 301; affirmed, 4 App. Cas. 711; *Thomas v. Lennon*, 14 Fed. Rep. 849; *Drone*, Copyr. 176.

Tracy's work was done with the consent of the original composers of the opera, and in their interest. There is nothing in our copyright law to prevent one of our own citizens from taking out a copyright of an original work composed by him, even though the work of composition was performed at the procurement and in the employment of an alien; or from assigning his copyright to an alien under an agreement made either before or after the composing of the work. A non-resident foreigner is not within our copyright law, but he may take and hold by assignment a copyright granted to one of our own citizens. The proprietor as well as the author is entitled to enter the work for copyright. The consent of Tracy was sufficient to constitute Browne the proprietor for the purpose, without a formal assignment. *Lawrence v. Dana*, 4 Cliff. 1, 65. The effect of the transaction was the same as if Tracy had made the entry in his own name, and then assigned to Carte.

The defendants insist that the method of proceeding by which the copyright was procured, and afterwards vested in the plaintiff, a non-resident foreigner, was a mere evasion of our copyright act, and as such is not entitled to the protection of the court. But I am unable to perceive how it can properly be called an evasion, if by that is meant a proceeding by which the letter or spirit of the law is directly or indirectly violated. The thing copyrighted was an original work, by an American composer, and therefore the lawful subject of copyright. All the steps taken to secure the copyright, and vest it in the plaintiff, were authorized by our statute. Undoubtedly the plan adopted displayed great ingenuity, and the effect is to vest in these foreign authors valuable American rights in their work; but there is nothing of evasion or violation of law. The plaintiff is therefore entitled to the protection of the court against infringers, if his copyright is otherwise valid.

Another question in the case relates to the title of the published book. The act provides that no person shall be entitled to a copyright of a book unless he shall, before publication, deliver at the office of the librarian of congress, or deposit in the mail addressed to him, a printed copy of its title, nor unless he shall also, within 10 days from the publication, deliver at the office of the librarian, or deposit in the mail, addressed to him, two complete printed copies of the book, of the best edition issued; and the librarian is required to keep a record of the names of all books entered. Rev. St. §§ 4956, 4957, 4959. The act does not say, in so many words, that the published book shall bear on its title-page the same title as that registered. But as the object of the registration is to give notice to the world that the author or proprietor has acquired the exclusive right of publication, the inference is that by "two complete printed copies"

is meant two printed copies with a title corresponding with the registered title, and that for the purpose of identification the registered title shall be substantially reproduced on the title-page of the published book.

On the eleventh March, 1885, Browne, as proprietor, filed with the librarian of congress a title in these words: "Piano-forte Arrangement of the Comic Opera, The Mikado, or The Town of Titipu, by W. S. Gilbert and Sir Arthur Sullivan. By George L. Tracy." On the twentieth April, 1885, the publishers delivered at the office of the librarian two copies of the printed book, which contained the piano-forte arrangement of Tracy, and on another staff the vocal score of the original opera to which the arrangement was an accompaniment, and also contained the songs of the opera, and had this title: "Vocal Score of The Mikado, or The Town of Titipu. Arrangement for Piano-forte, by George Lowell Tracy, (of Boston, U. S. A.,) of the above-named opera by W. S. Gilbert and Arthur Sullivan." They also, on the same date, made deposit in the librarian's office of a title corresponding with that on the title-page. Subsequently another edition was issued, containing the piano-forte arrangement and vocal score on the same staff, but without the songs, and bearing the same title as the first edition, except that the words "Piano-forte Score" were substituted for the words "Vocal Score." Two copies and a corresponding title were deposited on the tenth June, 1885.

The plaintiff does not rely on the titles entered April 20th and June 10th, which, it appears, were filed by the publishers without authority; but he rests his claim on the title entered March 11th, and the deposit of the books made April 20th. The defendants deny that the title of the book is the same as that named in the copyright of March 11th. But it seems clear that there is no such substantial difference between them as would justify the court in declaring the plaintiff's copyright forfeited on that account. The published title indicates with perfect certainty that the musical work contained in it is an arrangement for the piano-forte, composed by Tracy, of Gilbert & Sullivan's opera entitled "The Mikado, or The Town of Titipu," which is what was copyrighted. The only value of the arrangement was in its connection with the vocal score, and they must necessarily be published together, and some slight addition to the title of the book would be allowable on that account. The published title is sufficient to identify it with substantial certainty with the registered copyright, and no one could possibly be misled by the variations between the two.

The defendants, who are music dealers in Boston, were selling, when this bill was filed, a book of their own publication, entitled "Vocal Gems from the Mikado, or The Town of Titipu," which contains the songs and vocal score of the opera, and a piano-forte accompaniment composed by George E. Jackson, of Boston. On this part of the case it is only necessary to remark that it was clearly

proved at the hearing, by the testimony of musical experts of the highest authority, that Jackson's accompaniment is nothing but an ill-disguised imitation of the Tracy arrangement.

The conclusion is that the plaintiff has a valid copyright under our law, and is entitled to an injunction to restrain the defendants from infringing it. So ordered.

WILLIMANTIC THREAD Co. and others v. CLARK THREAD Co.¹

(Circuit Court, D. New Jersey. June 1, 1886.)

1. PATENTS FOR INVENTIONS—INFRINGEMENTS—DAMAGES—PROFITS—REV. ST. § 4921.

Prior to the act of July 8, 1870, patentees were not authorized to recover in a single suit both profits and damages, but had their election to treat the infringer as a trustee, and by bill in equity recover the profits made by him, or to sue at law for the damages sustained, without reference to the question whether the infringer had gained or lost by his infringement. Section 4921, Rev. St., authorizes courts of equity, in suits for infringement, to award, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained.

2. SAME—DAMAGES—PROFITS, WHEN MEASURE OF.

"Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent, in which event the provision is that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby." *Birdsall v. Coolidge*, 98 U. S. 69.

3. SAME—LICENSE FEE—APPORTIONMENT.

Where an established license fee for the use of a patent containing six claims was shown, and the defendant had infringed only two of the six claims, *held*, that it was the duty of the master to ascertain the relative value of the different claims, as nearly as the nature and circumstances of the case allowed, and to charge the defendant, for the use of the claims infringed, such proportion of the whole license fee as the testimony revealed they were relatively worth in their contribution to the efficiency of the machine.

4. SAME—BURDEN OF PROOF.

Where complainant seeks to recover damages on the basis of an established royalty for the use of several claims, only a part of which have been infringed, the burden of proof is upon him to show the relative value of the claims which have been infringed.

5. SAME—RELATIVE VALUE OF CLAIMS.

Where the claims not infringed are merely structural, and comprehended within those infringed, no apportionment of the license fee is proper.

On Exceptions to Master's Report.

Livingston Gifford and *Edmund Wetmore*, for exceptions.

Wm. C. Witter and *B. F. Thurston*, for complainants.

NIXON, J. An interlocutory decree was entered in this case on May 30, 1879, sustaining the validity of the letters patent No. 26,415, granted to Hezekiah Conant; holding that the defendant, the Clark Thread Company, had infringed the first and third claims, and re-

¹ Edited by Charles C. Linthicum, Esq., of the Chicago bar.

ferring the cause to S. D. Oliphant, Esq., as master, to take and report to the court an account of the profits received by the defendant, as well as of the damages sustained by the complainants. On the twenty-seventh of October, 1884, the master filed his report, stating that 33,837,282 dozens of spools had been wound by the defendant corporation upon machines like the complainants' Exhibits 5 and 6, between December 24, 1869, and July 2, 1879; that the established license or royalty was one-half of one cent. per dozen for each and every dozen spools containing 200 yards each, and in the same proportion for spools containing more than 200 yards; that at the rate of said license the aggregate amount of damages for winding 33,837,282 dozen spools was \$169,186.41; that 6 per cent. of said sum, to-wit, \$10,151.19, should be deducted for the relative value of the sixth claim of the complainants' patent, which claim was not used by the defendant, leaving due to the complainants for their damages the sum of \$159,035.22. To this report the defendant has filed seven exceptions, and the case is again before me on these exceptions.

From the testimony taken on the accounting it appears, on the admission of the defendant, that 33,837,282 dozen spools of thread, of 200 yards each, have been wound on machines which the court held infringed the first and third claims of the complainants' patent. There was also the sworn denial of the witnesses of defendant that they were aware of any profits to have been realized from the use of the Conant invention, alleging that the profit, saving, gain, or advantage derived from such use was chiefly, if not entirely, due to the inventions made by William Neild and Mr. Clark. If this statement of the defendant be accepted as true, the further consideration of profits must be dismissed, and the only matter left to be inquired into is the amount of damages which the complainants have sustained by the use of the Conant invention.

Before the act of July 8, 1870, patentees were not authorized, in a single suit, to recover both profits and damages. They had their election, either to treat the infringer as their trustee, and to file a bill in equity to recover the profits which the infringer had made by the unlawful use of the patented invention, or to sue at law for the damages which they had sustained, without reference or regard to the question whether the wrong-doer had gained or lost by its use; the measure of damages being not what the defendant had gained, but what the plaintiff had lost. But under the fifty-fifth section of that act, (section 4921, of Rev. St.,) courts of equity, on a decree for an infringement, may award to the complainant, "in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby." The rule in such cases is thus stated by the supreme court, in *Birdsall v. Coolidge*, 93 U. S. 69:

"Gains and profits are still the proper measure of damage in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent, in which

event the provision is that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby."

What damages, then, have the complainants shown? On the accounting it was clearly proved that the principal thread manufacturers of the country had taken out licenses under the Conant patent, for the royalty reserved of one-half cent for every dozen spools of 200 yards each. That was the uniform license fee established in all cases. The master has assumed, in the absence of proof of profits, that such license fee is the criterion and true measure of damages to the complainants. The defendant does not seriously controvert the rule, but insists that the license fee gave to the licensees the right to use the whole six claims of the patent; that the defendant in fact only used two, to-wit, the first and third; and that a rebate or reduction should be made for the non-user of the remaining four claims. How much such rebate should be, is the perplexing question.

It was the duty of the master to ascertain the relative value of the different claims, as nearly as the nature and circumstances of the case allowed, and to charge the defendant, for the use of the first and third claims, such proportion of the whole license fee as the testimony revealed they were relatively worth in their contribution to the efficiency of the whole machine. The burden of proof was upon the complainants, who accepted it, and offered evidence before the master designed and tending to show that the first and third claims embraced the vital mechanism of the invention; that the second, fourth, and fifth claims were merely structural, indicating only certain specific forms within which the invention could be worked; and that the sixth claim related to the organization of instrumentalities which enabled the machine to stop in case the thread-winding on the spool became broken, and worked independently of the other claims, and was to be credited with such proportion of the license fee as its contribution to the value of the whole mechanism of the invention was proved to be worth.

The master, in considering the testimony taken on the accounting, adopted the license fee for the whole machine as the fair measure of damages, followed what seemed to be the decision of the supreme court in affirming the court of claims in the case of *McKeever v. U. S.*, 14 Ct. Cl. 398, and recognized that he must make reasonable deductions for the relative value of the unused claims. He has reported that the second, fourth, and fifth claims were in fact only structural, and were comprehended within the mode of operation of the first claim, and that they should be regarded only as indications of particular methods for carrying out the invention; and that, on the other hand, the sixth claim, which acted independently of the first, should be credited with 6 per cent. of the whole amount that would have been due and receivable if license fees had been regularly paid at the rate of one-half of one cent per dozen for every dozen spools containing 200 yards each.

Without taking up the consideration of the exceptions *seriatim*, it is only necessary to observe that I have examined the evidence in the accounting record with care; that the wide discrepancy of views of the learned counsel arises from the different theories insisted upon by them on which the master should have proceeded; and that, so far as I find any rule for estimating the damages in such a case, I think the master has followed the one suggested or approved of by the supreme court in the above-quoted case.

The result therefore is that the exceptions to the report must be overruled; and it is so ordered.

THE ELLEN MCGOVERN.

(District Court, S. D. New York. June 4, 1886.)

1. TOWAGE—GROUNDING—NEGLIGENCE—BURDEN OF PROOF.

Where one of a large number of boats in a tow is injured by striking some obstruction on a trip over a common and safe route, the burden is upon the tug to give some rational explanation of the injury or a consistent account of the trip that may satisfy the court that there was no lack of due care in navigation.

2. SAME—CASE STATED—ROBBINS REEF—EVIDENCE—CREDIBILITY OF—TIDES.

The E. McG. was the port-boat in the hawser tier of a fleet of 20 boats in tow of the Y. A. from Amboy to New York. Before reaching Governor's island the strong ebb-tide compelled the fleet to put in to the sea fence at Red Hook. Shortly afterwards the E. McG. was found leaking, supposed by the master to be caused by bumping against the sea fence. This claim was rejected by the owners of the tug. A month afterwards, on raising the boat, a diagonal cut was found across her bottom, with some holes through, indicating contact with some obstruction as the cause of the leak. On the trial the libellant's wife, who lived on the boat, testified that when passing Robbins reef between 1 and 2 A. M., and very near the light, she felt a jar and subsequent roll that startled her and took her on deck. She did not mention the circumstance till the cut was discovered. *Held*, notwithstanding the discredit arising from her silence in the mean time, as the tug offered no other explanation of the injury, and the accounts given by her captain and pilot as regards her passage from Robbins Reef light to the sea fence and as to the tides and currents were irreconcilable, and the wife's testimony being in accord with the pilot's, her account should be credited as the only rational explanation of the injury; and the tug was held liable.

In Admiralty.

Edwin G. Davis, for libelants.

Biddle & Ward, for respondents.

BROWN, J. This libel was filed to recover for the damages done to the libelants' canal-boat, while she was in tow of the tug Young America, caused by running upon some obstruction during a trip from South Amboy to New York. The tug, with her tow of some 20 boats, meeting with a strong ebb-tide when opposite Red Hook, went in to the sea fence near that point, and reached there between 4 and 5

A. M. Shortly afterwards the libelants' boat was found to be leaking. The libelant at the time supposed that the leak was caused by bumping against the sea fence; and such was his statement then made. This claim was rejected by the respondents, and, as the event proved, rightly. A month afterwards, when the boat was raised and put upon the ways, a mark across her bottom was found, running diagonally from beneath the starboard bow to her port quarter, with several holes cut through the bottom along the way. This libel was thereupon filed, alleging the damage to have occurred from running upon rocks near Robbins Reef light.

There can be no question that the injury to the bottom was the cause of the leak, nor that this injury occurred while the boat was in tow of the Young America on the night in question. The tug is not answerable as an insurer, but only for reasonable care, and ordinary nautical skill. Her trip on that night, however, was over a perfectly safe and familiar course. Thousands of boats are constantly passing over the same course, and there are no obstructions in the way that ought not to be avoided by ordinary care. Such an injury as this to the bottom of one of the fleet in tow is not one of the ordinary incidents of such a trip, and is, at least, not likely to happen with ordinary care and skill. The burden of proof is therefore upon the tug to account for the injury; or to satisfy the court, by a reasonable and consistent account of the trip, that she has not failed in her duty to avoid all dangerous points, and that the injury arose through no lack of due care and skill in her navigation.

The captain's wife has testified with great minuteness concerning the events of the trip, giving many particulars bearing the stamp of undoubted truth, and showing quick observation and a retentive memory. She testifies that somewhere from 1 to 2 o'clock A. M., while reclining in the cabin, she felt a jar, as if the boat was rubbing upon something; that she was startled and went on deck, and saw Robbins Reef light off the port quarter, apparently not more than 100 feet distant, and felt the roll of the boat as it left the obstruction. It was inferred from this testimony that the tug had attempted to go between the buoy and the light, as is sometimes done to avoid a strong ebb in the bay. The captain, however, testifies that the boat went to the southward of the buoy, and not inside of it; that he passed it about 11 o'clock P. M., continued up the bay with the flood current, and met the ebb when he was nearly up to Governor's island, and that he went off duty at 1 A. M., as was his custom.

It was high water the evening before at 9:15 P. M. The currents in the Kills run about true with the almanac time. The surface current in the bay, or the North river tide, as it is called, does not change at once, but continues to run on for about an hour and a half, or, sometimes, as testified to in this case, for two hours after the change of tide at Governor's island, as indicated by the almanac and the height of water. The pilot testifies that he went on duty at 1 o'clock

A. M., and relieved the captain; that "he pulled up the bay for a while, until opposite Red Hook," when finding the tide too strong, and that he was making no headway, he sent word to the captain, and was told to go in to the sea fence; that he did so, and reached it about an hour and a half afterwards, between 4 and 5 o'clock A. M. From the Robbins Reef buoy to abreast of the Hook is but two nautical miles, and the tow was making at least two knots through the water. If, therefore, the captain is correct in supposing that he rounded Robbins Reef light, as he says he did, between 10 and 11 P. M., and that he had the benefit of the still continuing slack flood current, as he testified he did have after passing the buoy, Red Hook would have been reached before 12 o'clock, instead of at 3, as the pilot states.

There is no accounting for this three hours' interval of time, or for the difference between the pilot's testimony and the captain's testimony as to this interval. If the captain had already got near Governor's island when he met the downward current of the ebb-tide, and before the change of the watch at 1 o'clock, the pilot could not after he went on duty have "pulled up awhile" before reaching Red Hook at 3. The pilot's testimony in this respect is in approximate accord with what the libelant's wife testifies as to the time of passing Robbins Reef light; and if that time be within two hours of correct, the current could not have been running up in the bay at the time when the tow rounded the buoy at Robbins reef, but must have been strong ebb, since it was from three to four hours after high water.

Upon this discrepancy in the testimony of the libelant's chief witnesses as to the navigation, I am not warranted in disregarding the direct and positive testimony of the libelant's wife. As no charge was made at the time against the navigation of the boat, there was nothing that tended to fix the recollection of the captain and of the lookout in his watch with regard to any particular occurrences of that trip prior to putting into Red Hook. I must consider, therefore, that, without any intentional misrepresentation, they have testified, not from any precise recollection about rounding the buoy on this trip, but from the picture in their minds of their usual practice, or what they usually do; there being no recollection of any deviation from it. It was not unusual to go inside the buoy to avoid a strong ebb in the bay. The scratch may have come from that attempt; or it may be that in going too near the northerly shoals on coming out of the Kills on a strong ebb the libelant's boat touched some slight obstruction on the bottom, while the tug was pulling off strong to the eastward and southward of the buoy,—a position that would equally accord with the wife's testimony. A rub upon a rock sufficient to make this scratch and cut upon the bottom of the libelant's boat would not be perceived by the tug on a hawser 100 yards away; and, as I have said, it was not mentioned by the wife until a month afterwards. The pilot, on the other hand, who was obliged to put in to Red Hook, would be likely to remember the particulars of putting in

there, and what led to it; and his testimony should be regarded as coming from a more definite memory in reference to it, and as more likely to be correct; and it is consistent with that of the libelant's wife. Had the latter mentioned at or about that time, either to her husband or to others, what she now testifies that she noticed as to the jar at Robbins Reef light, no doubt would have been entertained concerning the truth of her testimony, or the cause of the accident. That she kept silence about it until the mark was discovered a month afterwards has cast great doubt upon her testimony. But this is not sufficient, under the circumstances, to cause its rejection, in the absence of any other explanation of the injury. The jar as felt was probably far less marked and alarming than it now appears in her testimony. As soon as it was over, no importance probably was attached to it. She was of a nervous and apprehensive temper. She lived upon the boat, and often had experiences that excited momentary alarm, when nothing ill resulted. It was not until the mark and cut were seen in the bottom of the boat a month afterwards that she connected them with the leak as the cause. This view will furnish some explanation, and it is the only rational explanation that occurs to me, for her failure to mention the circumstance at the time. Her account does furnish an explanation of the leak; it harmonizes with the pilot's testimony. Without this we have no explanation of the injury at all. The tug offers no explanation except the mere hypothesis of some entirely unknown obstruction in some other part of the trip. This is too general and speculative to acquit the tug on a trip over a safe and secure route. In the absence of any other explanation, therefore, I feel constrained to hold the tug answerable; not, however, without considerable hesitation and embarrassment, nor without a full recognition of the difficulties of the case, which has been ably presented and argued by the respondent's counsel.

Decree for the libelant, with a reference to compute the damages if not agreed upon.

THE OREGON.

RUSSELL and others v. THE OREGON.

(*District Court, S. D. New York. May 4, 1886.*)

SALVAGE—FIRE IN OIL-WORKS—TOWAGE—LIGHTERS.

A fire broke out in some oil-works on Bushwick creek, near the East river, within a shed inclosed by a brick wall immediately adjacent to the creek. Several lighters and other boats were moored near the shed. The standing orders of the company were to clear the creek of boats in case of any fire on the premises. There were other combustible materials in different parts of the premises near the shed. Soon after the fire broke out the libelants' tug, of light draught, came to the mouth of the creek, and was immediately

engaged to tow out three lighters partly loaded with naphtha, which were above the fire. The tug did so, devoting about two hours to the entire service. The lighters, with their cargo, were worth about \$4,500. *Held*, that the service was not a mere ordinary towage service, but one rendered with reference to the apprehension of danger of fire, and was therefore a salvage service, though of no high degree of merit; and \$200 compensation was awarded, one-half to the tug, the other half to the captain and crew.

In Admiralty.

Hyland & Zubriskie, for libelants.

Knox & Woodward, for claimants.

BROWN, J. During the forenoon of the fourteenth of November, 1884, a fire broke out on the premises of the Pratt Manufacturing Company's Oil-works, in a shed on the south side of Bushwick creek. The shed was about 100 feet long by 45 feet deep, inclosed by a brick fire wall about 20 feet high. When the fire broke out, the lighter Oregon lay outside of a canal-boat which was moored along-side of the shed, and within three feet of it. The canal-boat and lighter were immediately removed somewhat further up the creek; the lighter about seventy-five feet above the shed, and the canal-boat some two or three hundred feet further up. The premises in the vicinity of the shed were employed in the oil business, and there were various tanks in different parts of the grounds not far distant. The general orders of the Standard Oil Company, that control the whole premises, were that, whenever a fire occurred along the creek, the creek should be cleared of boats. The libelants' boat Alpha was towing a schooner down Newtown creek, when, observing the fire, the pilot dropped the schooner at the mouth of the creek, and went down to Bushwick creek, not far below. When he arrived there, he was hailed by the assistant foreman of the premises to come into the creek and tow out the lighters. The Alpha accordingly went into the creek, and succeeded in towing out the three lighters in a line upon a hawser. The Oregon had naphtha aboard; the other two lighters, refined oil. For this service a salvage award is claimed.

Two questions are presented: *First*, whether the service is entitled to salvage compensation; and, if so, the amount.

The rescue of property in danger of destruction by fire is a familiar ground of salvage award, where the essential elements of a salvage service exist. *The Connemara*, 108 U. S. 352; S. C. 2 Sup. Ct. Rep. 754. Such cases have frequently arisen in this court. *The Tampico*, 16 Fed. Rep. 491; *The Baker*, 23 Fed. Rep. 109; S. C. 25 Fed. Rep. 771. As respects the degree of danger, it is not necessary that there be a certainty of loss unless the service were rendered. It is sufficient that there is a reasonable apprehension of danger, and that the service is rendered in reference to that apprehension of danger, and not in the ordinary course of business. *The Raikes*, 1 Hagg. 247; *The Jos. C. Griggs*, 1 Ben. 81; *The Plymouth Rock*, 9 Fed. Rep. 413, 416.

There can be no doubt that the Alpha was not employed in the ordinary course of business, or that the service was rendered as a rescue from danger of fire. The superintendent, indeed, testifies that he did not regard the Oregon as in any position of danger, but altogether safe; that she might have been towed further up the creek, if necessary; and that the request to tow her out was on account of the standing orders to clear the creek, in case of fire. But I cannot doubt that this standing order was promulgated, in part, at least, on account of the danger that any vessels in the creek might be in, as well as to furnish additional room for the work of fire-boats that might be wanted to protect from loss other parts of the premises. A fire in one place might spread to others. The combustible materials all about the grounds were such as to favor the spread of fire; and it could never be certain till the fire was checked how far it might be communicated. The service desired of the Alpha in this case was sought under the pressure of this reasonable necessity, and because the respondent's own boat, the Niagara, which had been expected, did not make her appearance; and the removal of the boats from the creek could not be properly delayed longer under the standing orders mentioned. The fire was already under full headway. Of the many other tugs in the vicinity none but the Alpha was of sufficiently light draught to go upon the opposite side of the creek, somewhat away from the fire, and astern of the fire-boats, which took up a considerable portion of the creek. Under these circumstances, the service was of a salvage character, and not a mere ordinary towing service. The Oregon undoubtedly was not moved as far away from the fire as she might have been moved; but that, no doubt, was because it was expected that she would be taken out of the creek very speedily.

There is much contradiction between the witnesses as to the amount of the Alpha's exposure to the fire. On the libellant's part the testimony is that her deck hands were considerably employed in throwing water upon her house; that the glass of her sky-lights was broken by the heat; and that the neck, face, and hands of two of the persons thus engaged were burned and blistered; and that the paint of the boat was also injured,—her position being for some time opposite to the fire. Two disinterested witnesses who stood on the opposite bank testified to the same effect. Several of the respondents' witnesses say that the Alpha lay lower down in the creek, astern of the two fire-boats, which lay partly athwart the creek; and that the fire-boats lay between the Alpha and the fire. These discrepancies would, in the main, be reconciled if the Alpha, after first going opposite to the fire, and throwing out her lines, had then dropped back astern of the fire-boats; and such may have been the fact,—the libellant's witnesses testifying as to the former position, and the respondents as to the latter.

The services in this case, however, are not of any high degree of merit, considered as salvage services. Though the Oregon had naph-

tha aboard, she was at such a distance from the fire, and the service was so soon after the fire broke out in the shed within the walls, that I cannot regard the service as one involving much personal danger, although that element is not wholly out of the case. In other respects the service was not one of any special difficulty, or labor, or risk. The damage to the Alpha was slight. Her painting was not repaired until a year afterwards, and then at a slight cost, and this libel was not filed until some five months after the service. The value of the three lighters towed out, with their cargoes, was about \$4,500. I think \$200 will be a just and fair compensation, (*The Baker, supra*; *The O. M. Hitchcock*, 25 Fed. Rep. 777; *The Key West*, 11 Fed. Rep. 911; *The M. Vandercook*, 24 Fed. Rep. 472; *The Rialto*, 15 Fed. Rep. 124; *The Grid*, 21 Fed. Rep. 423; *The Mabel*, 22 Fed. Rep. 543; *The Florida*, Id. 617; *The Indiana*, Id. 925;) one half to be paid to the tug, the other half to the captain and crew, in proportion to their wages.

ONDERDONK v. SMITH and others.

(Circuit Court, S. D. New York. June 28, 1886.)

1. NEGLIGENCE—OCCUPIER OF PIER—HOW CHARGED GENERALLY.

A party who enjoys the exclusive privilege from the owner of a pier to use such pier in his business, though under no obligation to the owner in regard to repairs, assumes the duty to those invited there, to do business, not to expose them to peril by reason of defects in the condition of the premises known to him, or which, by reasonable diligence, would be known.

2. SAME—OBLIGATION TOWARDS INTRUDERS.

One who occupies, and has the exclusive use of, a pier for loading his coal, is not responsible for damage to a barge caused by a defect in such pier, when the barge, having received its load some time before, had no business at the pier at the time the damage occurred, and was injured by a defect that did not exist during business hours.

In Admiralty.

Charles W. Brooke, Geo. Bethune Adams, and Franklin A. Wilcox,
for respondents and appellants.

J. A. Hyland, for libellant and appellee.

WALLACE, J. The district court awarded damages to the libellant for the injuries to the scow barge and her cargo, occasioned by the sinking of the barge in consequence of being punctured by a spile which projected from the bottom of the slip, and directly under the place where the barge had taken her cargo. The defendants have appealed.

Although the appellants were not the owners or lessees of the pier, and were under no obligation, as between themselves and the owners, to make repairs, or remove any obstruction in the slip, inasmuch

as they enjoyed the exclusive privilege from the owners of using the pier and the adjoining slip for shipping their coal, and had to that extent the control and occupation of the premises, they assumed the duty towards those whom they invited there for the transaction of business not to expose them to hazard from any defects in the condition of the premises known to themselves, or which, by the use of reasonable diligence, should have been known. Their superintendent knew, and they were therefore chargeable with notice, of the existence of the spile, because, about three weeks before the occasion in question, another boat, the *Getman*, while lying at the same place, was struck by the same spile. On that occasion the *Getman* had taken on her cargo in the morning, the loading having been completed by 11 o'clock, but no tug came to take her away; and she remained there until half past 2 o'clock p. m., the tide in the mean time going down until it was somewhat more than half ebb, when she struck this spile. Her captain succeeded in getting her off without serious injury, but the attention of the appellants' superintendent was called to the occurrence.

If the scow had been injured by this obstruction while being loaded at the pier, or while going to it or away from it in the prosecution of the business which called her there, the case of the libellant would be clear. But the evidence is that her loading was completed at half past 4 o'clock in the afternoon, when the water was a little below high tide, and the accident happened about half past 9 in the evening, when the tide was low ebb; and if the scow had been removed from the place where she was loaded within a reasonable time after the loading was completed, she would not have been injured. When the tide went out, the scow settled down upon the spile, which projected about a foot from the bottom of the slip, and sufficiently far to puncture the boat at that condition of the water. The place was entirely safe, under ordinary circumstances, notwithstanding the existence of the spile. The captain of the *Getman* testifies that he had loaded his boat there 40 times without discovering the spile, and, although boats were being constantly loaded there, there is no evidence that any of these had ever encountered the spile except the *Getman*. It was only when the tide was at half ebb, or when, owing to some other cause, the water was low in the slip, that the place was not safe.

According to the usual course of business, the master of the scow should have hauled her away from the place where she was being loaded, when the cargo was fully delivered, to make way for other boats. Indeed, he had been expressly directed by the defendants' superintendent to move out of the berth when loaded, because another boat was expected to come in that afternoon. The master of the scow subsequently ascertained from the master of the other boat that the latter did not intend to begin loading that night, and assuming, doubtless, that there was no necessity for moving his boat away, as

the other boat was not to be hauled in, took the responsibility of permitting his boat to remain at the pier. He testifies that he asked permission of defendants' superintendent to allow his boat to remain there over night, and that the superintendent consented; but in this he is contradicted by the superintendent, and the latter's testimony is measurably corroborated by other testimony.

The only liability of the defendants grows out of their duty arising from their implied invitation to others to use the pier for the transaction of the business to which the pier was appropriated. Their invitation was spent when the boat's business at the pier was finished, and a reasonable time had elapsed to enable her to move away. After that she remained there at her own risk. It is not necessary to hold that she was there against the permission of the defendants, and therefore a willful trespasser; but, assuming that she was there without having obtained the permission of the defendant's superintendent, the defendants were not under any obligation to concern themselves for her protection. Under such circumstances, the law imposed no duty upon the defendants except the general duty which every man owes to others to do them no intentional wrong or injury.

The case is quite analogous to that of *Morgan v. Pennsylvania R. Co.*, 19 Blatchf. 239, S. C. 7 Fed. Rep. 78, (decided in this court.) There the plaintiff, while crossing the grounds of the defendant, fell into an unprotected pit, and was injured. He had often crossed there before, and others had done so. It was held that there was no invitation, and therefore that the defendant was not liable for the injury.

Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, when the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there. One who thus uses another's premises cannot complain if he encounters unexpected perils. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Bolch v. Smith*, 7 Hurl. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525; *Sutton v. New York Cent. R. Co.*, 66 N. Y. 243; *Johnson v. Boston & M. R. R.*, 125 Mass. 75; *Hargreaves v. Deacon*, 25 Mich. 1; *Pittsburgh, etc., Ry. Co. v. Bingham*, 29 Ohio St. 364; *Parker v. Portland Pub. Co.*, 69 Me. 173.

The libel is dismissed, with costs of the district court and of this court.

HOLLOWAY v. LANCY.¹*(District Court, D. Massachusetts. June 16, 1886.)*

DEMURRAGE—FAILURE TO OBEY INSTRUCTIONS OF CONSIGNEE—DELAY ARISING THEREFROM.

Libellant's schooner was ordered by the respondent, to whom it was consigned, to proceed to a certain wharf in a certain manner. The libellant endeavored to reach the wharf in another manner, and while so engaged the schooner grounded. In consequence of this a delay of eight and one-quarter days ensued. *Held* that, as the wharf designed was suitable, and the manner reasonable, and as the accident happened solely from the libellant's fault in not obeying the instructions given him, the libel must be dismissed.

In Admiralty.

Charles F. Walcott, for libellant.

Joseph M. Day, for respondent.

NELSON, J. This is a libel, by the master of the schooner L. S. Melson, against the consignee of a cargo of 312 tons of coal, brought from Philadelphia to Provincetown, for demurrage and expenses incurred in discharging a part of the cargo in lighters. In attempting to approach the consignee's coal wharf, in Provincetown, at which the master was directed to deliver the coal, the schooner grounded, and by this cause was detained eight and one-quarter days beyond the lay days stipulated in the bill of lading, and was obliged to discharge a part of the cargo by lighters before she could be got afloat. The disputed points were as to the depth of the water, and whether the master followed the directions of the consignee in approaching the wharf.

It was clearly proved that in front of the wharf, which extended out from the shore in a southerly direction, and on the easterly side, where vessels lay when discharging coal, the water was at least 10 feet deep at ordinary high tide. It was certainly of that depth when the schooner first attempted to enter. This depth of water was sufficient for a vessel of her draught, which was nine feet and four inches. But further out from the end of the wharf, on the east side, there was a shoal where the water was of less depth, and it was on this shoal that the schooner grounded. The libellant had never been in Provincetown before, and was unacquainted with the harbor. He states in his deposition that, in trying to get the schooner in, he followed the directions of the consignee, and he denies that the consignee informed him of the existence of the shoal. Perhaps the libellant is under some disadvantage from the circumstance that his testimony appears only by deposition, while the witnesses of the other side were examined orally in court. But, making every allowance on that score, I find myself unable to disbelieve the Provincetown witnesses, from whose testimony it is clearly proved that the libellant was directed by the consignee to bring the schooner in under sail, and was told about the shoal, and cautioned to beware of it. If he

¹ Reported by Theodore M. Etting, Esq., of the Philadelphia bar.

had obeyed these directions, the schooner would undoubtedly have come in safely, as other vessels of greater draught have done before and since. But instead of doing as he was directed, he took in and furled his sails, got his anchor, and then proceeded to warp the schooner in by lines of great length leading to another vessel lying at the end of the wharf. The result was that the schooner, being held only by the warps, was driven by the south-west wind off to the eastward of the shoal, and, in hauling on the warps from that direction, she was drawn directly upon it. The accident appears to have happened solely from the libelant's fault. As he was unacquainted with the ground, it was especially incumbent on him to observe the advice and directions of the consignee, who did know it, and was also responsible for the sufficiency of the water at the wharf. He can have no possible claim on the consignee for a detention occasioned by his own negligence.

Libel dismissed, with costs.

RACKETT v. STICKNEY and others.

(Circuit Court, S. D. New York. June 29, 1886.)

DEMURRAGE—CONDITION LIMITING—PRINTED CONDITION.

The libelant made an agreement with defendant to carry a cargo of coal to Boston, and received an order, directed to defendants' agent, giving instructions as to the loading, etc. This order contained the following: "This order is taken by the captain subject to the conditions printed on the back hereof." On the back was this indorsement: "No liability for demurrage or other charges shall be incurred by S. C. & Co., the cargo, or consignee thereof, for any delay in the loading; such delay to be borne by the vessel or boat." In an action for demurrage on a delay caused by S. C. & Co., it was held that the above condition was not binding on the vessel; that although it was signed by the master, this order was only a direction to the shipper's agent, and there was no proof that the master's attention had been called to the condition.

In Admiralty.

Hyland & Zabriskie, for respondents and appellants.

Wilcox, Adams & Macklin, for libelant and appellee.

WALLACE, J. The libelant, through a broker, made an agreement with the defendants November 13, 1884, to carry a cargo of coal on the schooner Ireland for them from South Amboy, New Jersey, to Boston, at a specified freight. The defendant's office was in New York city, where the contract was made. They promised that the cargo should be delivered on the seventeenth day of November. The master of the schooner was present at the time of the negotiations. After the terms were agreed upon, the defendants, in the presence of the broker, handed the master an order, directed to their shipping agent at South Amboy, instructing the latter to load the schooner with coal, stating the name of the consignee, and the rate of freight, and directing him to make an advance when the schooner was loaded. The terms of the order were written into a printed blank, which, below the signature of the defendants, contained the following: "This

order is taken by the captain subject to the conditions printed on the back hereof." On the back was the following indorsement: "No liability for demurrage or other charges shall be incurred by Stickney, Conyngham & Co., [the defendants,] the cargo, or consignee thereof, for any delay in the loading; such delay to be borne by the vessel or boat." The master took the order without reading the conditions, and delivered it to the defendants' shipping agent. The schooner was detained, by the delay of the defendants, three days after the seventeenth, the defendants not being prepared to deliver the cargo. The district court decreed for the libelant for three days' demurrage, and the defendants have appealed.

The appellants rely upon the defense that there was a special contract between themselves and the libelant, whereby they were to incur no liability to the libelant for any delay in loading the schooner, the delivery to and acceptance by the master of the order, with the condition on its back, constituting such special contract. As the order was delivered to the master in the presence of the broker, the case may be considered as though the order had been delivered to the broker himself, and is thus relieved of any question as to the authority of the captain to modify a contract which had been concluded between the libelant and defendants. The real question, then, is whether an assent on the part of the libelant to a contract differing from that which had previously been made between the parties is to be presumed from the acceptance of the order containing the restrictive conditions as to the liability of the defendant. Assent is conclusively presumed where a unilateral instrument, such as a deed or policy of insurance, is delivered by one of the parties to, and accepted by the other as the result of, verbal negotiations. So, also, it is ordinarily presumed where a shipper takes from a carrier a bill of lading or receipt expressing the conditions of the reception and transportation of the goods, which is his only voucher and evidence of the liability of the carrier. Under such circumstances, the verbal negotiations are merged in the written paper, which must be taken as the evidence, and the only evidence, of the final and deliberate agreement of the parties, except when fraud or mistake is shown; and mistake can only be shown as the ground of equitable relief to form the contract. The last class of cases is not without exceptions, as where the conditions are on the back of the receipt. See *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Ayres v. Western R. Corp.*, 14 Blatchf. 14; *Henderson v. Stevenson*, 2 H. L. Sc. App. Cas. 470.

There is another class of cases in which a party seeks to relieve himself from the obligations of an implied contract with another, or to supplement the terms of an express contract by the force of printed or written regulations or notices. Notices or regulations made by those exercising a public, or *quasi* public, employment, like carriers, express companies, telegraph companies, and savings banks, are familiar illustrations. In these cases the question always is whether knowledge of the notice or regulation has been brought home to the

other contracting party. The inference that it has been is sometimes irresistible, from the circumstances of the transaction out of which the contract originated. Thus, where the sender of a message by a telegraph company writes his message upon blanks furnished to him by the company, containing the conditions upon which the latter undertakes to act, the courts have held that, by delivering the message, the sender assents to the conditions specified. *Young v. W. U. Tel. Co.*, 65 N. Y. 163; *Wolf v. W. U. Tel. Co.*, 62 Pa. St. 83. So, also, where a depositor in a savings bank at the time of making his deposit receives from the bank and retains a pass-book containing printed conditions authorizing the bank to pay the deposit to any person producing the pass-book, it is held that the depositor assents to the conditions as a part of the contract. *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418.

The authorities fall short, however, of supporting the proposition that assent is to be implied, as a matter of law, to the modification of a contract which has been concluded verbally by the acceptance by one party from the other of an order directed by the latter to his own agent, which is to be delivered to the agent, and retained by him. The order was a letter of instructions from the defendants to their own agents. The libellant's broker had no reason to assume that he was expected to study its terms. It was delivered to him, or to the master of the schooner, not to be retained by him as evidence of the verbal contract, but to be transmitted to the defendants' agent for his information. Treating it as a voucher that the master was to receive a cargo of coal from the defendants' agent, the master could not be expected to assume that it was intended to qualify the promise of the defendants that the cargo should be ready for delivery upon a specified day. A somewhat analogous case is that where a ticket is accepted by a railway passenger, which is to be held by him until delivered to the conductor as evidence of the payment of his fare. The passenger's assent to a special contract limiting the liability of the railway company respecting his baggage is not to be implied from the circumstance that there is a notice to such effect printed on the back of the ticket. Actual knowledge of the terms of the notice must be brought home to the passenger, and his acceptance of the ticket is only evidence for the jury of such knowledge. *Brown v. Eastern R. Co.*, 11 Cush. 97.

There is evidence, to which it is not important to refer, tending to show that both the libellant's broker and the master of the schooner were aware that similar orders to the one given here, contained printed conditions in substance like those on this order. But the witnesses were examined before the district judge, and, after a full opportunity to judge of their credibility, he came to the conclusion that they were not aware that the order in question contained such conditions. His judgment on this question should be accepted as correct.

The decree of the district court is therefore affirmed, with interest and costs.

BRYANT and others v. THOMPSON and others.

(Circuit Court, S. D. Iowa. June Term, 1886.)

1. REMOVAL OF CAUSE—REVIEWING INTERLOCUTORY ORDERS OF STATE COURT.

The United States circuit court does not sit as a court of errors in a cause removed from a state court, but it has the same power to reverse or modify interlocutory orders or decrees of a state court as the state court would have had, had the cause remained there, or as it would have, had the cause originated in the United States circuit court.

2. SAME—RENEWING MOTION WHICH HAD BEEN DISMISSED BY STATE COURT—DISCHARGING RECEIVER.

A motion to discharge a receiver, made on the same grounds on which it had been previously dismissed in the state court, will not be granted by the United States circuit court after removal of cause to the latter court.

In Equity. Motion to discharge receiver.

J. C. Power and H. Scott Howell & Son, for plaintiffs.

S. L. Glasgow, for defendants.

LOVE, J. This cause is here by transfer from the district court of Iowa for the county of Des Moines. Before its removal a receiver was appointed by the state court to take possession of the property in controversy, and to collect the rents and profits of the same. The defendant, prior to his application to have the cause transferred, moved before the state court for an order to discharge the receiver, and restore the possession of the property to him as the rightful owner. The grounds of this motion, among others, were that the appointment of receiver had been made improvidently, and without due notice to the defendant. The district judge seems to have considered this motion upon the defendant's answer, and such evidence as is applicable to such a proceeding, and, after hearing the arguments of counsel, he denied the motion, and entered an order overruling the same. The defendant now renews in this court his motion to remove and discharge the receiver. He offers no evidence to support his motion in addition to that upon which the state district judge refused to grant his application.

It is argued by counsel that this court does not sit as an appellate tribunal in cases transferred from the state court, but takes them, and proceeds with them to a final determination, just as they come from the state court; and therefore it is insisted that it is not competent here to review or reverse any proceeding that may have been had in the state court before the removal of the cause into this court. I am aware that this language is to be found in the decisions of some federal courts, but, without proper qualification, it is misleading. It is true that in removal cases the United States circuit court does not sit as a court of errors, and that as such it cannot review and reverse the interlocutory orders and decisions of the state courts. But it is nevertheless competent for the circuit court to set aside or modify

any interlocutory orders or decisions made in the state court before removal, when it satisfactorily appears that such orders are erroneous. The circuit court after the removal certainly has the same power over the decisions made in the state court that it has over its own past rulings and orders in the cases commenced originally before it. If a case transferred had remained in the state court, it would have been entirely competent for that tribunal to have changed, modified, or set aside its own orders, when satisfied that they were erroneous. Thus, if the state court had granted a temporary injunction, it would have been competent for the same court, upon a proper showing, to set it aside. If it had, upon a proper hearing, denied a motion to dissolve an injunction, it would have been entirely competent for it to entertain another motion to dissolve, and to grant such second application upon a satisfactory showing. So, if a state court denies an application to remove or discharge a receiver, it may, so long as the cause is still before it, with competent jurisdiction, entertain and grant a subsequent motion for the same purpose. The same may be said of all its interlocutory orders.

Now, when a cause is removed from the state court to the United States circuit court it stands in the latter just as it stood in the state court before removal. All orders and rulings in the state court remain in full force until they are changed or set aside in the circuit court. But the circuit court, certainly, has the same power over them—the same jurisdiction to modify them or set them aside—that the state court would have had if the cause had not been removed. Interlocutory orders made in the state court clearly do not, by virtue of their removal to the United States circuit court, receive any such additional force and effect as to preclude the circuit court from doing with them what the state court might have done if the cause had remained there. The circuit court certainly has the same power over interlocutory orders and decrees made in the state court before removal that it might exercise over its own past decretal orders and decisions in a cause originating before it. The United States circuit court will treat the decisions of the state court before removal with precisely the same respect, and give them the same force and effect, that it would bestow upon similar orders and decrees made in its own tribunal; but it will not give them any greater force and effect than its own interlocutory orders and decisions would be entitled to.

So much with respect to the power of the court to which a cause is removed, to change, set aside, or modify orders made in the state court while the cause was before it. It is nevertheless my judgment that the order made in this cause in the state court, denying the application to remove the receiver, should not, on the showing now presented, be set aside. Suppose a motion were made in this court to discharge a receiver of its own appointment, and suppose the court had refused to grant the application, would it entertain the same

motion a second time, and, without any additional evidence or showing, grant the application? It certainly would not. Without some most cogent reason the court would not set aside its own solemn judgment, entered after due consideration and full argument.

Now, it appears that this same motion to discharge the receiver was made before the state district judge. It was argued before him, and the application denied. It is before us upon the same evidence and showing that were presented to the state judge. No additional evidence to support the motion has been adduced before us. We shall treat the judgment of the state judge just as we would our own decision under similar circumstances. We certainly would not, under such circumstances, reverse and set aside our own order, and we shall not reverse and set aside that of the state judge without some further and more cogent evidence that it was erroneously or improvidently made.

KESSINGER v. HINKHOUSE.

(Circuit Court, S. D. Iowa. June Term, 1886.)

1. REMOVAL OF CAUSE—JURISDICTION—MOTION TO REMAND.

On a motion to remand a cause to the state court from which it was removed, the petition for removal is the basis of jurisdiction. It is not in the province of the pleadings in the state court to state the grounds of jurisdiction in the United States circuit court.

2. SAME—FEDERAL QUESTION—IOWA PROHIBITION LAW—DEPRIVING PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW—FOURTEENTH AMENDMENT.

Where a petition for the removal of a proceeding in equity under the Iowa prohibition law, in which the complainant sought to obtain an injunction against the defendant to restrain him from the violation of that law, sets forth facts showing that the defendant had vested property rights at the time the law went into effect which the injunction would operate to destroy, *held*, that this raises a question under the fourteenth amendment to the United States constitution, depriving a person of property without due process of law, giving the United States circuit court jurisdiction.

In Equity.

D. C. Cloud, for plaintiff.

H. J. Lauder, for defendant.

LOVE, J. This cause originated in the circuit court of Muscatine county, Iowa. It is a proceeding in equity, under the Iowa prohibition law, by which the complainant seeks an injunction against the defendant to restrain him from a violation of the Iowa liquor law, and a decree declaring the defendant guilty of keeping and maintaining a public and common nuisance. The cause has been transferred to this court by order of the Hon. NATHANIEL FRENCH, the judge of said circuit court, against the objections of the complainant, resisting said order. The complainant now moves to remand the cause to the state court. The recognized ability and unquestioned impar-

tiality of the judge by whose order the cause was removed to this court, would lead me to hesitate in making an order reversing his judgment by remanding the cause to the state court. I do not doubt that he gave the objections to removal urged by the complainant careful and patient consideration, and that he reached his conclusions upon solid grounds of fact and law. I have, after mature reflection, reached the same conclusion at which Judge FRENCH arrived upon the question of jurisdiction.

As I have repeatedly said in other cases, the petition for removal is the basis of jurisdiction here. It is not the province of the pleadings in the state court to state the grounds of jurisdiction in this court. The allegation of the jurisdictional facts is quite foreign to the pleadings in the state court, and any averment of the facts giving jurisdiction here would be quite irrelevant and impertinent in the pleadings in the state court. The cause is removed upon the allegations and averments of fact as to the jurisdiction contained in the petition for removal. We must, therefore, upon a motion to remand, accept the statement of the jurisdictional facts in the petition for removal as *prima facie* true. If they are not true, the party against whose consent the order of removal was made may contest them by a plea in abatement to the jurisdiction. *Clarkhuff v. Wisconsin, I. & N. R. Co.*, 26 Fed. Rep. 465.

The statements of the petition for removal, material to the present motion, are that the matter in dispute exceeds the sum of \$500; that the petitioner was, prior to the fourth day of July, 1884, engaged in the lawful business of selling ale, wine, and beer, the same not being prohibited by any law then in force, upon the premises described in the plaintiff's petition; that by the act which then (July 4, 1884) took effect it was provided that any person engaged in selling ale, wine, and beer as a beverage should, upon conviction thereof, be punished by fine and imprisonment; that many years before the passage of said act the petitioner, Rudolph Hinkhouse had, at great expense, to-wit, in the sum of at least \$2,500, erected upon the premises described in the plaintiff's petition a building for the express and sole purpose of occupying the business portion thereof as a saloon, wherein to sell ale, wine, and beer, and for no other purpose whatever; that said building, having been constructed for such purpose alone, could only, at great expense, to-wit, in the sum of \$300, be fitted for any other use or occupation; that the right and privilege of using and occupying the building is of the value of \$1,000; that if this action prevail the petitioner will suffer damage and loss to the amount of \$1,000 by reason of his deprivation of the use and occupation of said building, and that the depreciation of said building will be in a like and similar sum; that the business which the petitioner had in the course of years attracted to the house, and its good-will, worth \$1,000, would be lost and destroyed to petitioner by the success of said suit; that prior to July 4, 1884, when the prohi-

bition act took effect, the petitioner had on hand, and has ever since had on hand, and now has, wines and liquors, the sale of which had theretofore been lawful, and that if the plaintiff's action be maintained the same will be confiscated and destroyed; that prior to said act of 1884 the petitioner had, at a cost of \$250, procured proper fixtures for carrying on said business, and placed the same in said building; that said fixtures, furniture, etc., are fit only for said business, and cannot be used for any other purpose than that for which they were designed and placed in said building; and that the petitioner would be compelled either to abandon or destroy said fixtures, furniture, etc., in the event of said suit being sustained.

Do the facts thus stated raise a federal question within the jurisdiction of this court? The question is not whether the facts thus stated in the petition for removal would, if pleaded as an answer to the plaintiff's petition in the state court, be sufficient to defeat the object of that proceeding. This must be borne carefully in mind in considering the present motion to remand. It is a mere question as to the tribunal in which the controversy shall be heard and determined.

This court is bound, let me repeat, by the decision of the circuit judge in *State v. Walruff*, 26 Fed. Rep. 178. What was that case? It was, in brief, that Walruff had, at great cost, established a brewery in Lawrence, Kansas, when the manufacture and sale of beer were lawful in that state. By subsequent legislation the manufacture of beer was prohibited, and an injunction was sued out in a Kansas state court to enjoin the defendants absolutely from the manufacture of beer. "Thus," said Judge BREWER, "in strict conformity to the laws of the state, the defendants were prohibited from using their property for the purposes for which alone it was designed, adapted, and valuable, and were required, without compensation, to surrender \$45,000 of value" in property which they had acquired in strict conformity to existing law. The subsequent legislation of Kansas did not directly assail the defendants' right of property in the brewery. It aimed not to divest him of his vested right in the buildings and plant by any direct exercise of legislative power. It was by making the use of the property which had been lawful, unlawful, that its value was reduced from \$50,000 to \$5,000, and the defendants' right consequently invaded. This, the circuit judge held, raised a question under the federal constitution, which authorized the defendant to remove the cause for adjudication into the federal court of Kansas.

Now, where is the line of distinction between the case of *State v. Walruff* and the present case? It was lawful to sell wine, ale, and beer in Iowa prior to the act of 1884. It was lawful to fit up and prepare property for that purpose, to purchase furniture, and to invest money in ale, wine, and beer, for sale. A party investing money in these things had a clear legal vested right of property in them, and a right to use them for the purpose for which they were designed, that purpose being lawful. Judge BREWER says:

"Debarring a man, by express prohibition, from the use of his property, for the sake of the public, is a taking of private property for public use. It is the power to use not the mere title which gives value to property. Give a man a fee-simple title to a flour-mill coupled with an absolute prohibition of its use, and what value is it to him?"

It is, of course, apparent that the case of *State v. Walruff*, decided by Judge BREWER, is, in some respects, much stronger in its facts and equities than the present case; but wherein do they differ in principle? Rights and equities do not depend upon the amount involved in a decision, and the deprivation of a small sum may be more grievous to a person of small means than the loss of a great amount to a person of ample wealth.

It is alleged in the petition for removal, among other things, that the petitioner, prior to the act of 1884, and thence to the time of the proceeding against him, had on hand certain wines and liquors the sale of which had theretofore been lawful. Wines and liquors thus held were lawful property. Could the legislature, by a subsequent act, prohibit the sale of them without an invasion of the petitioner's right of property? Judge BREWER quotes with approbation, and as a guide to his own judgment, the language of Mr. Justice MILLER in the case of *Bartemeyer v. Iowa*, 18 Wall. 129, as follows:

"But if it were true, and if it were fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the state of Iowa first imposed an absolute prohibition on the sale of such liquors, then we can see that two very grave questions would arise: Whether this would be a statute depriving him of his property without due process of law; and (2) whether, if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court."

And Mr. Justice BRADLEY:

"The law, therefore, was not an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that the legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of public good, they are to be removed by awarding compensation to the owner."

And Mr. Justice FIELD adds these words:

"I have no doubt of the power of the state to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it, nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any state the fourteenth amendment affords protection."

In the case of *Munn v. Illinois*, 94 U. S. 141, Mr. Justice FIELD says:

"All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of these deprives him of all that is de-

sirable and valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received."

And in the case of *Beer Co. v. Massachusetts*, 97 U. S. 25, the court declares that "if the public safety, or the public morals, requires the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without compensation; but we infer that the liquor in this case, as in the case of *Bartemyer v. Iowa*, was not in existence when the liquor law of Massachusetts was passed."

Motion to remand overruled.

MCLANE and another v. LEICHT, Jr.

(Circuit Court, S. D. Iowa. June Term, 1886.)

1. REMOVAL OF CAUSE—PETITION FOR REMOVAL, BASIS OF JURISDICTION—PLEADINGS.

On a motion to remand a cause to the state court from which it has been removed, the petition for removal is the basis for jurisdiction; but when the petition fails to state all the facts of jurisdiction, and refers to the pleadings in the state court for the same, the United States circuit court will look to them.

2. SAME—PLEADING—ALLEGATION OF MATTER OF LAW—IOWA PROHIBITION LAW.

Where the petition for the removal of a cause from the state court to the United States circuit court sets up that, prior to the late Iowa prohibition law, the defendant erected the building and established the plant in question, to be used in the sale of beverages such as at that time the law authorized and permitted, this is an allegation of matter of law, and not sufficient to give the United States circuit court jurisdiction.

In Equity.

Newman & Blake, for plaintiffs.

P. H. Smyth & Son and *S. L. Glasgow*, for defendant.

LOVE, J. This case is before the court upon a motion to remand to the state court. All motions to remand must be decided primarily upon the facts which appear upon the face of the record. But what is the record? Counsel seem to rely in part upon affidavits filed in the state court to support the motion for a temporary injunction, but such affidavits are manifestly no part of the record, so far as the motion to remand is concerned. This court has recently decided that the record is primarily the petition for removal, and secondarily of

the pleadings in the state court. It is not the province of the pleadings in the state court to state the jurisdictional facts which authorize a removal of a cause to this court. Indeed, it is quite foreign to the purpose of the pleadings in the state court to set out and aver such jurisdictional facts. If by mere averment in the pleadings filed in the state court the jurisdiction of this court could be defeated, any party wishing to prevent a removal could accomplish his purpose by the convenient means of averring certain jurisdictional facts wholly immaterial to the cause in the state court, yet quite sufficient to repel the jurisdiction of this court. It is manifest that the petition for removal must be the basis of jurisdiction here. It must be taken as *prima facie* true. It may, with certain exceptions, aver the jurisdictional facts to be contrary to the same as alleged in the pleadings in the state court. See *Clarkhuff v. Wisconsin, I. & N. R. Co.*, 26 Fed. Rep. 465.

When, however, the petition for removal fails to state explicitly all the facts of jurisdiction, and refers to the pleadings for the same, the court must needs turn its attention to that source to ascertain the jurisdictional facts. The averments of the petition for removal in this case are that the amount in dispute is, exclusive of costs, the sum or value of \$500, and that the controversy in said suit involves questions "arising under the law and constitution of the United States." We have here a distinct and explicit averment of one jurisdictional fact, namely, that the matter in controversy is of the value of \$500. As to the allegation that the "controversy involves questions arising under the constitution and law of the United States," it is no statement of the existence of any fact whatever. It is an allegation of matter of law, not matter of fact. I suppose, indeed, that the petitioner so considered this averment, and intended that the court should look to his answer filed in the state court to see whether or not, as a matter of law, the "suit involves questions arising under the law and constitution of the United States."

We must, then, look to the issues made by the pleadings to see whether, in fact, they involve a federal question of which it is competent for this court to take jurisdiction. If the answer alleged that the defendant had purchased or erected property and machinery prior to the recent prohibitory legislation, for the purpose of carrying on the business of brewing beer, which was then a lawful business, and that the present proceeding in pursuance of the recent state legislation aimed to deprive him of the use of his property for that purpose, and thus destroy its value without compensation, the case would be within the decision of Circuit Judge BREWER in *State v. Walruff*, reported in 26 Fed. Rep. 178; and since we are bound here to follow that case, without respect to our own views, the motion to remand would be overruled if the answer contained substantially that allegation. But the answer makes no such averment of jurisdictional facts. Indeed, it seems to have been drawn by the pleader with the purpose of avoid-

ing that issue. It avers that the defendant, prior to the late prohibitory legislation, erected the building, and established the plant in question, for the express purpose of being used for the sale of beverages such as the law at that time authorized and permitted; that said premises were erected and fitted up, at great expense, and adapted to said particular use; and, further, that before the enactment of said law the defendant, with a view to the use hereinbefore described, purchased said property at a cost of \$13,000, to be used by him in a business at that time authorized by the law of said state. It is apparent that the pleader studiously avoids stating the particular use for which the building was erected, and the kind of plant established before the prohibitory legislation. If it was for the manufacture and sale of such intoxicants as wine and beer, the use was lawful, and the property used just as rightful, in a legal sense, as any other kind of property; but if it was for the manufacture and sale of whisky, brandy, and the like, then the use was unlawful, and the plant not within the protection of the law as it existed at that time. It will not do for the pleader to make himself the judge as to whether the use to which the property was applied before the prohibitory legislation was lawful or unlawful, prohibited or not prohibited, by the evasive allegation that it was "erected and fitted up for the purpose of selling beverages at that time authorized and permitted by law." That is an allegation of matter of law, not matter of fact.

The facts of jurisdiction must be stated in order that the court may judge whether or not the property was erected and fitted up for a then lawful purpose. If the pleader had stated the fact to be that prior to the prohibitory legislation the property had been bought or erected, and fitted with proper machinery, for the manufacture of wine or beer, the court might say that the plant was established for a lawful purpose, and that the attempt to deprive the owner of the use of it for that purpose by retrospective law raised a federal question, within the guiding rule laid down in the case of *State v. Walruff*. But, on the contrary, if the averment was that the erection and plant were for the purpose of making and vending of such intoxicants as brandy and whisky, the court would be compelled to pronounce a wholly different judgment.

Upon the case as it stands, the averments in the record are insufficient to give this court jurisdiction, and the motion to remand must be sustained.

KESINGER v. VANNATTA.

DEIMER v. FRANZ.

(Circuit Court, S. D. Iowa. June Term, 1886.)

COURTS—STATE AND FEDERAL COURTS—JURISDICTION—INTOXICATING LIQUORS.

Whether the law of Iowa prohibiting the sale of intoxicating liquor is in violation of the constitution of the United States, and therefore involving a question of which the federal courts have jurisdiction, is involved in so much doubt that the federal courts will not assume jurisdiction, but will remand the cause to the state courts, since no material rights will thereby be affected.

In Equity.

D. C. Cloud, for plaintiff.

H. J. Lauder, for defendant.

LOVE, J. These cases are here by transfer from the circuit court of Iowa for Muscatine county. The plaintiffs move to remand. They are petitions in equity under the Iowa prohibition law. The purpose of the bill in each of them is to enjoin the defendant from continuing the business of vending intoxicating liquors, and to declare the saloon in which the business is carried on, with its fixtures, furniture, etc., a nuisance, and to deal with it as such under the law. These cases have been removed to this court upon the ground that they involve a federal question which gives this court jurisdiction. The contention of the defendants is that if these proceedings shall prevail against them they will be deprived of their property, and certain other rights, without due process of law, in violation of the constitution of the United States.

I have considered these cases with great attention, and the conclusion which I have reached is that the motions to remand involve questions of difficulty and doubt as to the jurisdiction of this court. It is the constant practice of this court to remand causes brought here from the state courts in cases of doubtful jurisdiction. The reason of this practice is obvious and conclusive. In the first place, the jurisdiction of the state court is unquestionable. It is, at least, concurrent with this court. But the jurisdiction of this court depends upon special facts, and it is in the present case, to say the least, doubtful. It is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it here, and go through all the forms of trial, when the jurisdiction is doubtful.

Again, if we sustain the motion to remand, exceptions can be taken at once to the order, and, because that order is a final adjudication here, a writ of error to the judgment of this court can be taken to the supreme court of the United States, and disposed of in that court

within a week or 10 days after the commencement of its next term. If, on the other hand, the order to remand is refused, and this is error, it can only be corrected in the supreme court after the delay and expense of a trial in this court, which would prove a most serious inconvenience to all parties.

There is another consideration that has weight with me in remanding these cases. If jurisdiction exists here by reason of their transfer from the state court, any final judgment which may be entered in the state court when the causes are again before them may be reviewed by appeal to the supreme court of the United States, if the judgment of the state court shall be against the defendant; for the defendants invoke the constitution of the United States as a defense against the relief asked by the plaintiffs. They thus raise a so-called federal question, and this federal question is the sole ground of transfer from the state court to this court. The same ground, if the decision of the state court shall be against them on that question, will give them an undoubted right to appeal for redress to the supreme court of the United States from the judgment against them in the state court. By remanding the causes, therefore, we do not deprive the defendants of any redress to which they may be entitled by appeal to the final judgment of the supreme court of the United States. If the defendants are right as to the very grounds upon which they claim that their causes should be retained here, any judgment which the state court may render against them will inevitably be reversed upon appeal to the supreme court of the United States from the state court in which the final judgment may be rendered.

For these reasons I deem it much the wiser course for all parties concerned to remand these causes to the state court. The jurisdiction of this court depends upon a question of serious doubt, raised by the defendants, under the constitution of the United States. I feel unwilling to retain here a large number of causes from the state courts, and go through all the forms of trial with them, at great expense and delay, seeing that our jurisdiction is subject to grave doubt, by reason of which all that we may do here may be reversed and annulled.

MAHIN v. PFEIFFER and another.

(Circuit Court, S. D. Iowa. June Term, 1886.)

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DESTROYING LEASEHOLD PROPERTY OCCUPIED FOR SALOON—DUE PROCESS OF LAW.

Where a lease was made of premises to be occupied for the purpose of the sale of ale, wine, and beer, containing a clause that the lease should be forfeited unless so occupied, and before the expiration of the term of said lease the act of the legislature of Iowa was passed and went into effect prohibiting the sale of ale, beer, etc., and imposing penalties for violating said law, *held*, that these circumstances presented a federal question, within the principles of *State v. Walruff*, 26 Fed. Rep. 178, and that there is no difference between the destruction of leasehold property and any other kind of property by retrospective legislation, without compensation.

In Equity.

D. C. Cloud, for plaintiff.

H. J. Lauder, for defendant.

LOVE, J. This is a removal case from Muscatine county, Iowa. The plaintiff moves to remand. The proceeding is by petition in equity, under the Iowa prohibition law. The petition contains a prayer for an injunction, and for general relief. It is charged in the petition that the saloon in question is a public nuisance, and, if this allegation be sustained, the same may be, under the prayer for general relief, abated by a decree of the court. The complainant makes both the saloon keeper and the owner of the property leased for that purpose defendants, and prays for relief against both of them. In this, as in all removal cases, the court must look primarily to the petition for removal for the facts which give this court jurisdiction. The reason of this rule, with its limitations, is fully set forth in *Clark-huff v. Wisconsin, I. & N. R. Co.*, 26 Fed. Rep. 465.

Turning to the petition, for removal, we find it alleged that the matter in controversy exceeds in value \$500; that prior to July 4, 1884, when the recent prohibitory law took effect, the defendant Pfeiffer was engaged in the lawful occupation of selling, at retail, beer and wine, the sale of which was not then prohibited by law, upon the premises described in the plaintiff's petition; that by the recent act, which took effect as above stated, it was enacted that any person engaged in selling ale, wine, or beer, as a beverage, should, upon conviction, be punished by fine or imprisonment, as provided in said law; that prior to the passage of said act of July 4, 1884, defendant Pfeiffer had leased the premises in question for a term extending beyond the said fourth day of July, 1884, for the express purpose of occupying the same as a saloon wherein to sell ale, wine, and beer, and for no other purpose; that by the terms of his lease he was prohibited from using the same for any other purpose; that prior to the passage of the act of 1884 he had, at great expense, procured proper

fixtures and furniture for carrying on said business, and had placed the same in said premises; that the same are fitted and adapted to said business, and no other business whatever; that if this action prevail, the same will be of no value whatever, to the great damage of said defendant; that the defendant's lease has not yet expired, and is to continue a number of years; that said leasehold is of far greater value than the sum paid for it; and that if the present action be sustained said defendant will be greatly damaged in consequence of his deprivation of said leasehold; and that the good-will of said defendant's business, the result of his labor and industry, which is of great value, will be destroyed.

From this statement it appears that before the act of 1884 the petitioner leased property for a purpose which was at that time lawful; that by the terms of his lease, if it be not used for that purpose, the same may be forfeited; that by the present proceeding, in pursuance of a retrospective law, providing for no compensation, his leasehold will be rendered valueless, and in effect destroyed, if the same shall be used for a purpose which was lawful when it was made.

If these facts be not true, they can be controverted here by a plea in abatement to the jurisdiction, and, if the issue on that plea be found for the plaintiff, the cause will be remanded. But upon this motion the jurisdictional facts thus stated being taken as *prima facie* true, the question is, do they raise a federal question within the doctrine of *State v. Walruff*, 26 Fed. Rep, 178? The question is not what the decision of this court would be upon the merits of the controversy, but whether jurisdictional facts exist which entitle the removing party to a hearing in this tribunal. Is there any substantial difference between the destruction of leasehold property and any other kind of property by retrospective legislation without compensation? If there is not, I can see no distinction in principle between the present case and the case of *State v. Walruff*.

Pfeiffer, the lessee, and Weir, the owner of the leased premises, unite in the petition for removal. Weir leased his property for what was at the time a perfectly lawful purpose. It seems, by the averments of the petition, that he restricted its use to that purpose, and this he had a right to do. Before the expiration of the lease the legislature saw fit to declare that purpose no longer lawful, and to provide heavy penalties and destructive proceedings to prevent the use of the property for the purpose designated in the lease. In a word, the legislature denounced as a nuisance what had been the lawful business for which the property was leased. It is not the purpose of the court at this time to decide whether or not the legislature of Iowa had the power to destroy the vested right of Weir in his lease by a retrospective act, without compensation. The only question now before the court is whether or not the case presents a federal question, within the case of *State v. Walruff*.

Weir, the owner of the property, had no control of it when this suit

was commenced. He had leased it before the act of 1884 for a lawful purpose, and the term of the lease had not expired. He had, by the terms of the lease, according to the statements of the removal petition, restricted the use of the property to the sale of ale, wine, and beer. This restriction was probably imposed to prevent the tenant from selling such intoxicants as brandy, whisky, and the like, which might have exposed the property itself to severe penalties. I do not see how Weir could have controlled the tenant in the use of the property so long as the latter used it for the purposes, and none other, prescribed in the lease. Yet, under the provisions of the act of 1884, the building itself, as well as its furniture and fixtures, may be declared a nuisance, and dealt with as such, according to the severe provisions of that act, and of the subsequent amendatory act of 1886. It seems to me that the case is within the principles laid down in the case of *State v. Walruff*.

Motion to remand overruled.

KESSINGER v. LEIBRACHT.

WING v. HOEHL.

(Circuit Court, S. D. Iowa. June Term, 1886.)

In Equity.

LOVE, J. The decision in *Mahin v. Pfeiffer*, ante, 893, disposes of these cases.

LINDROTH v. LITCHFIELD.

(Circuit Court, S. D. Iowa. May Term, 1886.)

1. PRINCIPAL AND AGENT—RATIFICATION.

A principal who receives and appropriates purchase money of land sold by his local agent for him, and rents collected, and who likewise appropriates repairs made on his real estate by such agent, thereby ratifies the agency, and is estopped from repudiating the action of such agent in any transaction within the general scope of the business.

2. SAME—GENERAL AGENCY.

Under such circumstances, the agency becomes, not special, but general, and third persons dealing therewith are entitled to actual notice from the principal of any restriction of the agent's authority, though in a special agency the contrary is true.

In Equity.

Good & Phillips, for complainant.

C. H. Gatch, for defendant.

LOVE, J. The question in this case is whether or not J. H. Brown had due authority to bind Edwin C. Litchfield by the contract of sale to Charles A. Lindroth which bears date at Ogden, August 16, 1881.

After going carefully over the evidence, I must express my surprise that any serious doubt should have arisen about the authority to make the contract in question. That John H. Brown was the general agent of Litchfield at the Ogden office, with authority, so far as third persons were concerned, to do and perform all the business of Litchfield connected with that office, and that the sale of lands was not only a part of its business, but its chief purpose, seems to me to be established by the evidence beyond all reasonable doubt. E. C. Litchfield owned a large quantity of land in Iowa, situated in several different counties. He was desirous of selling these lands, and he had them upon the market for sale. John Brown, of Des Moines, was his general agent, not only for the sale of Litchfield's lands, but for the management of all things connected with them. It is evident that the sale and management of so many thousands of acres, covering a large extent of country, could not be successfully conducted from the single, and, as to a large part of the land, distant, office at Des Moines, where John Brown resided. So, at least, thought the parties concerned; for they established other offices nearer to the great body of the lands, for the purpose of managing and selling the property. One of these offices was opened at Ogden. Now, John Brown, the chief agent, could not attend in person to the business of the agency at the different places where the subordinate offices were opened. Therefore the appointment of subagents was a matter of necessity, and, in my opinion, the power of John Brown to appoint subagents was clearly implied from the very nature of the business committed to him by his principal.

We find John H. Brown at the head of the Ogden office, and in full management of its business. It matters not by whom he was appointed,—whether by Litchfield or by John Brown, his father, who had implied authority to place him in charge of that office. No doubt he was placed there by his father, and acted in subordination to the latter. I am satisfied myself, from the evidence, that Litchfield knew of John H. Brown's subagency, and that he recognized it in various transactions; for the evidence is clear and satisfactory that John H. Brown sometimes corresponded directly with Litchfield, made remittances to him for sales and collections, and delivered deeds executed by Litchfield, on sales made by himself as agent. There is evidence, moreover, that Litchfield was once, at least, at Ogden; that he was seen with John H. Brown; and that the latter introduced him to various persons found there. It is, in my opinion, in the highest degree improbable that Litchfield did not know of John H. Brown's subagency.

John H. Brown was, for a number of years, in charge of Litchfield's business at Ogden. It was not for a day or a month, or even a single year, but for a number of years, that he was so engaged. It is in evidence by witnesses who personally knew the facts that John H. Brown made sales of Litchfield's property, and received the purchase

money, in whole or part; that he made remittances to Litchfield, and delivered deeds executed by him; that he attended to the payment of Litchfield's taxes, and deposited money to redeem land which had been sold for taxes; that he attended to Litchfield's land suits, and made numberless affidavits as his agent; that he purchased lumber, and made repairs upon improved farms that belonged to Litchfield; that he deposited in bank money which he said belonged to Litchfield; and that he drew the same out, to be remitted to Litchfield; and that he collected rents and made collections for Litchfield; all this, and much more, for a series of years.

In view of these facts, it seems to me preposterous to assert that John H. Brown was not the general agent of Litchfield, though no doubt subordinate to his father, for the transaction of Litchfield's business connected with the Ogden office, and that Litchfield was not aware of the fact that he was so acting. I make no doubt that Litchfield's chief correspondence was with John Brown, the father; but that he had more or less direct communication with John H. Brown concerning the business of the subagency there can be no doubt.

This is placed beyond all question by the evidence, and especially by the testimony of William A. Kelly, an unexceptionable witness, who speaks from personal knowledge. See his testimony on his cross-examination by defendant's counsel.

It would be impossible, in this written view, to go particularly into the evidence, but reference to a few established facts may be convincing in this connection. J. S. Pitman, the postmaster at Ogden, testifies, on cross-examination by defendant, that he had seen correspondence coming from Litchfield's office, New York, to J. H. Brown; had read in Brown's office some of the correspondence; saw more or less of it from 1876 to 1882; was postmaster at Ogden during those years, and J. H. Brown mailed a great deal of matter to Litchfield, and a great deal of matter from Litchfield's office came to J. H. Brown; and that J. H. Brown often showed him deeds, contracts, and letters from Litchfield's office. There is a great mass of evidence proving conclusively that J. H. Brown was in full charge and control of the Litchfield land-office at Ogden; that he was a general agent for the supervision, sale, and management of Litchfield's lands there; and that Litchfield knew of his agency, and recognized it. The witnesses testify, in many cases, from personal knowledge, and not from the report of others, or hearsay, as affirmed in the written argument presented by the defendant.

If, therefore, the general agency of John H. Brown, and his consequent authority, so far as third persons were concerned, to make the sale in question, depended upon the recognition by Litchfield of such general agency, I could entertain no doubt of the validity of the sale in question. But in my opinion the validity of that sale can be sustained without any such recognition on the part of Litchfield.

The fact is beyond question that a subagency was established at Ogden, the chief purpose of which was the sale of Litchfield's land. Does any one question that the office was opened there with full and competent authority, and that Litchfield knew of its existence? Does any one question the authority of John Brown to establish for Litchfield the land-office at Ogden? The evidence is entirely satisfactory to me that this office, and its purpose, was known to Litchfield; that it was in fact his office; and that, at the death of John Brown, his agents took possession of the books, papers, etc., appertaining to it.

Now, this office was established mainly for the purpose of selling Litchfield's lands, and, connected therewith, the payment of taxes, the redemption of land sold for unpaid taxes, the collection of moneys due Litchfield on sales, etc. The office was placed in charge of John H. Brown. No notice was given, as it appears, even by general publication, of any restriction upon his authority. Now, what might third persons dealing with John H. Brown, under such circumstances, assume as to his power to make sales, and receive money upon sales? J. H. Brown was clearly not a special agent. He was not authorized to do some one particular act for his principal,—such as to sell some one tract of land, or to execute a deed, or to collect a given sum of money, or to redeem particular land from sale. He was a general agent, with power to do any and all acts within the scope of the business committed to him. Had third persons not a clear right to assume that he was empowered to sell Litchfield's land, and to receive money in payment, or part payment, of the same? Was the sale of land not within the scope of that business? Nay, was it not the chief purpose for which that agency was established, and had third persons not a right to assume that the person placed in charge of it was empowered to do what it was the leading purpose of the office to accomplish?

This agent performed, without special authorization, all the other duties of the office. He paid taxes; collected and remitted money; made affidavits as agent; purchased lumber for repairs; deposited in the bank the money of his principal, and remitted the same; kept the books; made monthly reports,—in a word, did anything and everything pertaining to the office at Ogden. No one questions that he had, by virtue of his office, authority to do all these things. Were purchasers of land to take notice, without any warning whatever, that the one thing this agent could not do without special authority was the very thing that the office was mainly established to accomplish, namely, the sale of his principal's land? If a merchant, at a distance, should establish a house for the sale of merchandise, and put it in charge of an agent, would not that agent have full power to make all sales within the ordinary scope of that business, and according to its usages? In such case, would any instructions to the agent, not notified to third persons, restraining his authority to sell, or directing his manner of making sales, contrary to the usages of the

trade, be of the least avail in respect of the validity of sales made by the agent to third persons? None whatever.

It is said by counsel that the particular sale in this case was not reported to Litchfield; that it was never ratified or approved by him; that it was contrary to his prescribed forms and terms; that it was a "sale in short," so called, whereas Litchfield had prescribed printed forms of sale to his agents, etc. But it is not pretended that the purchaser had any notice or knowledge whatever of any of these things. How could he be affected by such limitations of the agent's authority without notice? Did the agent, in his manner of selling, proceed contrary to the usages of that business? Was it not within the usual and ordinary scope of such an office for the agent to effect the sale, make a memorandum of it in writing, and receive the cash payment? If the agent had authority to receive the cash payment, and if he did receive it, acting within the scope of his employment, it would work a manifest fraud upon the purchaser to allow Litchfield to repudiate the sale on the ground that the agent failed to act according to his private instructions. It is said that it behooves every person dealing with an agent, and knowing that he professes to act according to authority, and so bind another, to look to the authority of the agent, and see that he does not transcend its limitations. This is the law in regard to special agencies, but it is not the law of such an agency as this, which was not a particular, but a general, agency.

Litchfield was bound by all the acts of J. H. Brown within the scope of the business of that office, except in cases where third persons had notice of some restriction upon his authority. The giving of assent to assignments, as the evidence shows, was a transaction within the line of its ordinary business. Where J. H. Brown gave such assent and received payments from the assignee, Litchfield is estopped, whether Brown accounted to him or not. As to the mode in which the written memorandum of sale was made and signed in this case, it is wholly immaterial. John H. Brown was authorized to sell the land. He did sell it, and receive the first payment. Under such circumstances the sale was binding without any written memorandum at all. The memorandum in writing which he gave to the purchaser was, at most, only evidence of the contract. It was not essential to its validity, a payment having been made. I do not mean to say that a contract signed by J. H. Brown, exactly in the way the present one was executed, would not be good without any payment. If it were necessary to decide that question upon the evidence now before me, I should not hesitate to hold the execution of the instrument sufficient to bind Mr. Litchfield.

FOSTER v. CITY OF JOLIET.¹

(Circuit Court, N. D. Illinois. June 9, 1886.)

1. MUNICIPAL CORPORATION—CONTRACT TO BUILD WATER-WORKS—RESCISSION.

A contract by which one S. promises a municipality to construct and operate water-works, and which contains the provision that, "in case of failure of the party of the first part to construct or maintain said water-works as herein agreed, the rights and franchises hereby granted to him shall cease and determine," is not rescinded by *ex parte* action of the municipality, *e. g.*, by a resolution of its city council, without judicial proceedings.

2. SAME—EXTENSION OF TIME FOR PERFORMANCE—INJUNCTION AGAINST MUNICIPALITY.

Where one S. agrees with a municipality to construct and operate water-works to supply water to the public by a contract which contains the forfeiture clause set forth in the preceding head-note, and which does not make time the essence of the contract, and S. and his assignees construct and put in operation water-works not complying with the contract, and the non-performance of the contract is due largely to the acts of both parties, and in part to unsuccessful experiments authorized by the municipality, *held*, (1) that S. and his assignees are entitled, before they are liable to a forfeiture of their rights under the contract, to a reasonable time in which to perform it; (2) that an injunction lies to restrain the municipality from interference with the pipes laid, or to be laid, by S. and his assignees during the extension of time granted to them.

3. CONTRACT—WHAT IS PERFORMANCE.

Where one contracts to supply water from artesian wells, supplying water from other sources equally good or better is not compliance with his contract.

In Equity.

James L. High, for complainant.

Benj. Olin and Dent, Black & Cratty Bros., for defendant.

BLODGETT, J. The bill in this case charges that on the fifteenth day of March, 1880, a contract was made between one Jesse W. Starr, Jr., of the first part, and the defendant city, of the other part, by which Starr agreed to construct and maintain, in the most substantial and workman-like manner, subject to the inspection and approval of the city council of defendant, an effective system of water-works, to supply the city and citizens of Joliet with water for domestic, manufacturing, sanitary, and fire purposes, and for that purpose to put down one or more artesian wells, or as many as should be required to furnish at least 500,000 gallons daily, and to put down, from time to time, new artesian wells, so as at all times to furnish the city and citizens an ample supply of water, and to a depth that would insure water of a good quality; that he would construct a reservoir with a capacity of at least 2,500,000 gallons, which should be entirely protected from surface water, into which the water from such artesian well should be conducted; that, if necessary, he would construct a stand-pipe of sufficient height into which the water should be pumped, and from

¹ Edited by Russell H. Curtis, Esq., of the Chicago bar.

which it should be distributed through the street mains; that he would furnish and lay down eight miles of street mains, of such diameter as the city counsel should approve, but not to exceed ten inches, nor be less than four inches, in diameter, with all needful valves and stop-gates, on which should be placed 50 two-way fire hydrants, to be located by the city; and that such water-works should be sufficient to throw, at one time, a one and one-fourth inch stream of water, at least 100 feet high, from any five hydrants; that he would furnish, and put into complete working order, pumping machinery, to consist of at least two sets of first-class engines, and two sets of first-class boilers, which should have a pumping capacity of at least 3,000,000 gallons in 24 hours; that he would supply private citizens along the line of the street mains with water at certain rates stipulated in the contract.

In consideration of this undertaking on the part of Starr the city agreed to give the water company exclusive rights in its streets for 30 years for water purposes, with the proviso that, in case of failure to construct or maintain such water-works, the rights and franchises granted should cease and determine; that the city would pay for the 50 fire hydrants provided by the contract to be located on the street mains an annual rental of \$7,000, payable in equal quarterly installments; that the city would pass all needful ordinances to preserve the purity of the water, and protect the machinery of the water-works from injury by malicious persons, and to prevent waste of water; that, in cases of change of grade of the streets, the city would pay the cost of relaying the water mains and pipes. It was further agreed that Starr should extend the mains beyond the stipulated eight miles as fast as he could obtain an assured income of at least \$1,500 per annum per mile, and to place five fire hydrants on each additional mile of main, if so requested by the city, for which the city was to pay an annual rental of \$40 for each hydrant. It was further agreed that Starr should commence work within 60 days from the date of the contract, and complete the same within one year after such 60 days.

By a supplemental agreement made June 7, 1880, it was agreed that there should be ten miles of street mains instead of eight, and that the number of fire hydrants located on such mains should be sixty instead of fifty; that the size of the street mains, within the limits of four and sixteen inches in diameter, should be designated on a map to be prepared by Starr, and by him presented to the chairman of the then committee on water-works of the city council, and the sizes indicated on such map should be subject to modification within the limits of four and sixteen inches, within five days after the presentation of such map to the chairman of such committee; and that the annual rental of the fire hydrants should be \$8,500, payable in equal quarterly installments; and by a further supplemental contract, dated October 9, 1880, it was provided that, in lieu of ar-

tesian wells provided for in the original contract, Starr might, at his election, supply the city with spring water from springs on and in the vicinity of the Brown farm, just east from the Rowell gravel pit, such springs of water to be thoroughly protected from surface-water drainage and surface impurities of all kinds, the stream from such springs to be banked so as to keep the surface water therefrom; but this change in the source of supply was not to dispense with the reservoir provided for by the original contract, nor in any way relieve Starr from any of the other covenants in his contract; and, if the springs should not supply the quantity of water required by the original contract, artesian wells were to be sunk, as required by the original contract.

Starr entered upon the performance of the contract; constructed the reservoir and stand-pipe; laid 10 miles of mains in the streets, and of the sizes designated upon the map duly presented to the water-works committee of the city council; and furnished and put in pumping machinery, engines, and boilers; and up to about the twelfth of December, 1881, was actively engaged in the construction of the works as provided for in the contract.

It is further charged that, in November or December of the year 1880, Starr caused a corporation to be organized by the corporate name of "The City of Joliet Water-works Company," and assigned to such corporation said contract with the city, and all his rights and privileges and interest therein, and sold and transferred to said company all the machinery, reservoirs, water-pipes, hydrants, real estate, water-rights, etc., then owned or possessed by him pertaining to such contract; that said water-works company, on the ninth of December, 1880, made and delivered to the Guaranty Trust & Safe Deposit Company of Philadelphia a mortgage upon all its lands, tenements, and water-works then owned, or thereafter to be acquired, with all its pipes, machinery, pumps, pumping engines, engine-houses, and equipments, for the purpose of securing the payment of 280 bonds of said company for the sum of \$500 each, bearing date on said ninth day of December, payable to the said Guaranty Trust & Safe Deposit Company on the first day of July, 1910, with interest at the rate of 6 per cent. per annum, payable on the first days of January and July of each year; that such bonds were placed upon the market, and sold to purchasers for value; that default was made in payment of interest on said bonds, and a bill filed in this court to foreclose the mortgage; and such proceedings had under such bill that a sale was made of the mortgaged property, and complainant Foster became the purchaser of said property for and on account of the owners and holders of said bonds, who joined with him as complainants in this case; and that said Foster had been put in possession of the property under said purchase by order and decree of this court, and has since August, 1883, had possession and control of said water-works, and of the property, engines, machinery, reservoirs, pumps, and pipes

pertaining thereto; that said Foster, in behalf of the parties interested as purchasers, had expended large sums of money in improving and repairing the works, and in sinking a new well, from which an ample supply of pure water in excess of the amount called for by the contract is now obtained.

The bill further alleges that in December, 1881, the city council of the defendant city adopted a resolution declaring that all the rights and privileges of Starr under his contract were revoked, forfeited, and determined; that notwithstanding such water-works company had been in possession and control of said water-works more than a year prior to the passage of such resolution, and that complainant, Foster, was a purchaser under the sale made by this court, and has been in possession of such water-works since August, 1883, and has, with the knowledge of the city authorities, expended large sums of money in the repair and improvement of the water-works, yet the city council of the defendant city, on the twenty-third of July, 1884, adopted resolutions directing proceedings to be instituted to prevent the complainant from further operating such water-works in the city, and from repairs of said works, and the pipes pertaining thereto in the streets of the city, and to force said Foster, as the representative of the purchasers of said property, to abandon the same to the city, or some other person, at a nominal price.

The prayer of the bill is that the defendant city be restrained from commencing any suit or proceeding having for its object the forfeiture of the contract in question, and from interfering with or molesting the complainant in the use of the streets of the city for water-works purposes under the contract.

The answer admits the making of the contract in question; that Starr commenced the construction of the water-works under the contract; but avers that he did not complete the same within the stipulated time; that he did not obtain an adequate supply of water from the springs mentioned in the supplemental contract of October, 1880, and did not sink artesian wells to supply the quantity of water called for by the original and supplemental contract; that the works were not adequate to supply water for fire purposes; that there was not power adequate to throw streams of water from the five hydrants to the height called for by the contract; that the city refused to accept the works as constructed, and adopted resolutions declaring all rights under the contract forfeited. The answer further charges that the water supply since the complainant, Foster, obtained control of the works has not been pure nor healthful, nor in such quantity as the necessities of the city require; that the reservoir has not the capacity called for by the contract; that impure surface water is freely admitted thereto, and the water pumped from the well tainted thereby, and charges that it was the purpose of Starr and of the water-works company, while in charge of the works, to impose upon the city an insufficient water supply system, and impose water such as was not

contemplated by the original contract, and the supplemental contract thereto; and that the complainant also has failed since he came into control of the water-works to materially improve the water supply, either in quantity or quality, or to so improve the pumping machinery and pipes as to make a safe and reliable water system for fire purposes.

A replication was filed to this answer, and the case has proceeded to proof and final hearing.

The position of the complainants is that they and their predecessors have so far complied with the substantial features that they should be allowed to maintain and extend their water system so as to meet the demands of the residents of the city in the more densely populated area, and that they should be permitted to enjoy the exclusive right to use the streets of the city for water purposes which was granted to Starr under the contract, and which the complainants claim as successors and assigns of Starr; while the contention of the defendant is that Starr, the company, and the complainants have all fallen so far short of a compliance with the terms of the contract as to justify the defendant in treating the contract as forfeited, and denying to the complainant any rights in it.

The proof shows that about November 8, 1881, notice was given by the water-works company to the mayor and city council of the city that the water-works were completed, and ready for operation, and that soon after such notice a public exhibition or test of the capacity of the works to throw a stream of water from the five hydrants was made, which showed that they were not capable of throwing water to a height much exceeding 85 feet. Starr attributed this failure to a lack of power, and proposed to put in another set of boilers, increasing the boiler capacity one-half, upon being advised that the works would then be satisfactory to the council. But there is also proof in the case showing quite satisfactorily that one, if not the principal, reason of the failure of the works to comply with the test called for by the contract was that the mains were too small, over seven miles of the ten miles of main pipe laid being only four inches in diameter; and it is insisted that the defendant city is equally responsible with Starr for this small size of the main pipe, because the size of the pipe, between a minimum of four inches and a maximum of sixteen inches in diameter, was to be decided by the committee of the city council within five days after the map of the location of the mains should be presented to the chairman of the committee, and that such map was duly presented, and no fault found or change insisted upon.

I think it may be taken as established by the proof that these water-works, as constructed by Starr, or under his supervision, at the time the city was asked to accept them, in November, 1881, did not conform to and fill the conditions of the contract. The spring on the Brown farm was found to be wholly inadequate to furnish the supply

of 500,000 gallons per day called for by the contract, and no artesian well was sunk, or steps taken to sink one, for the purpose of supplying the deficiency. The reservoir, while large enough to hold the required quantity of 2,500,000 gallons, was not made sufficiently tight to prevent the flow or percolation of surface water into it, and was not so guarded by embankments, or otherwise, as to prevent water from the surrounding surface from overflowing or running into it. The want of sufficient power, or the small size of the mains, or both causes combined, made it impossible to throw water from the fire hydrants to the height stipulated; but the proof also shows that Starr and the company expended over \$107,000 on the construction of the works, and that the complainants have, since they purchased the property, expended over \$31,000 more in repairs and improvements; and that the property is now in a much better condition than it was at the time that Starr made his experiments or tests.

The action of the city council, by the adoption of the resolution of December 12, 1881, declaring the contract forfeited, cannot be considered as effective to work a total rescission of the contract, and to put Starr and those claiming under him in the position of intruders, and divest them of all rights under the contract. The forfeiture clause of the contract is: "In case of failure of the party of the first part * * * to construct or maintain said water-works as herein agreed, the rights and franchises hereby granted to him shall cease and determine." This clause does not enable one party only to the contract to set it aside, and end it, of his own will. The contract, under this clause, may be terminated for failure to construct or maintain the proposed water-works, but it must be done on some equitable basis, in which, as far as possible, justice may be done to both parties; and hence the *ex parte* act of the city declaring the contract forfeited did not forfeit it, nor terminate the rights of the water-works company in the city under the contract.

If the city authorities, in the fall of 1881, were dissatisfied with the work as then constructed, at the time when Starr announced them to be completed according to the contract, a bill in equity might have been filed at once asking for a rescission of the contract on the proper terms; but the city neglected to file such a bill; allowed the complainants, or those whom they represent, to expend over \$30,000 in improvements upon the works; dealt with the complainants as the owners of the works; accepted water for the use of the public schools, police head-quarters, and the city-hall, and paid for the same without complaining; and only just before the filing of this bill did the city intimate any intention to resort to judicial proceedings for the purpose of excluding the complainant, and those whom he represents, from the streets of the city. Litigation was, however, initiated by the complainant, and it is undoubtedly the duty of this court to decide what the equitable rights of the parties are under the existing facts.

The proof satisfies me that the engines, pumps, and machinery are now, and were at the time this bill was filed, adequate to pump the maximum supply of water called for by the contract; that the reservoir is, in fact, larger than required by the contract, but is not now, and perhaps has never been, properly protected from surface water. The size of the mains, which, as it is claimed, so largely contribute to the insufficiency of the water-works for fire purposes, is, I think, so far attributable to the joint action of the two parties that the city cannot allege it as a ground of forfeiture.

It is true that Starr agreed that the works should be sufficient to throw water from five hydrants at a time, to a height of 100 feet; but if the defect in the performance of the works in this regard comes from the fact that the mains are too small, thus increasing the friction of the water column to such an extent that the force of the engines is wasted or lost, as some of the defendant's expert witnesses testify, then it may be said that Starr should have known of this defect, and was bound to remedy it within a reasonable time, notwithstanding the city authorities were informed of the size of the water mains, and did not object, but the acquiescence of the city authorities in the size of the mains put in makes the mistake a mutual one, and neither party should take advantage of it. The chief difficulty I have encountered in the case is the fact that the contract required that artesian wells should be sunk to procure the water supply. Since the complainant, Foster, has had possession of the works a well about 30 feet deep has been sunk, which would seem, from the proof, to furnish an ample supply of water; but it is not an "artesian well," as that term is usually understood and defined. In Ure's Dictionary of Arts, Manufactures, and Mines an "artesian well" is defined to be "a well or bore-hole, in which water is obtained by means of a perforation bored vertically down through impermeable *strata*, into underlying *strata* of a more or less permeable character, such stratum to be charged with water. * * * Properly speaking, an artesian well is one in which the water from the lower stratum rises above the surface of the superincumbent impermeable *strata*, but, by extension, the phrase has been applied of late years to any wells in which waters of the lower stratum are enabled to rise sufficiently near to the surface to allow of their being economically used." That is to say, an artesian well need not be a flowing well, but the water must come from beneath the impermeable stratum, so as to be uncontaminated by surface matter. Thus, the city of London contains a large number of so-called "artesian wells," sunk through the "London clay," as it is termed, and through the rock underlying this clay, into the chalk formation, where the water is found; but these wells do not overflow, the water being obtained from them by pumps. The well sunk by complainant, while it passes through a comparatively thin layer of clay, cannot, I think, be called an "artesian well;" the stratum of clay overlying the water-bearing stratum of

gravel not being thick enough, nor shown to be extensive enough, to make it certain that objectionable surface seepage will not at times contaminate the water.

By the supplemental contract of October, 1880, the parties so far waived the obligation to put down artesian wells as to accept, or agree to accept, the water from a spring or springs, provided such spring or springs should furnish a sufficient supply of water; but if the supply was not sufficient, then a resort was to be had to artesian wells. Having authorized Starr to use this spring water instead of artesian wells, he was justified in making a trial of the springs; and it was not right or equitable for the city to forfeit the contract because the experiment with the spring was a failure, but time should have been given Starr, or the water company, to bore an artesian well; but, instead of doing this, the city declared the contract forfeited, and refused to pay the hydrant rent, and thereby precipitated a financial failure upon the water company, and left the bondholders no alternative but to foreclose their mortgage, and take the water-works in the condition in which Starr and the company left them. Since that time the city has persistently denied all rights to the complainant and the company, and has placed them by its action where they could not safely proceed to complete the works without some judicial decision defining the rights of both parties. If the city at the time it passed the resolution declaring the Starr contract forfeited had filed a bill in equity asking to have the forfeiture enforced, I have no doubt a court of equity, under the circumstances, would have given the water company sufficient time to comply with the contract, and only decreed a forfeiture after the expiration of such time, in case the work was not substantially completed as required by the contract; because equity abhors a forfeiture, and a court of equity would not have enforced the forfeiture of this contract, and of the privileges granted and money expended under it, without giving a suitable opportunity to the party to fulfill it. So, now, with both parties before it, this court, under the present bill, should, I think, give the complainant time to sink an artesian well or wells; and complete or repair the reservoirs so as to exclude surface water; and to relay its mains, as far as necessary, so as to obtain, without dangerous pressure, the requisite head to throw water from the hydrants to the height of 100 feet, as required by the contract.

It is urged that the water in the well sunk by the complainant, from which the present supply is obtained, is as good, if not better, than water from other artesian wells which have been bored in that city, but this court cannot make a new contract between these parties. They have stipulated for artesian well water, and the court cannot compel the city, or its inhabitants, to accept anything else.

My conclusion is that complainants stand in such a position that they have the right now to go on and complete the works, and that no forfeiture should be allowed or enforced until they have had a rea-

sonable time to do so. The delays in completing the work, while a breach of the letter of the contract, are not such as should work a complete forfeiture of all rights acquired and money spent under it. Time was not made the essence of the contract, and the present situation of either party is not such as to entitle the city to insist upon a forfeiture. There is no proof that the city has lost anything by the delay, or that the complainants cannot now go on and fulfill the contract. A decree may, therefore, be entered declaring that the complainant is lawfully in possession of the streets of the city for water purposes under the provisions of the Starr contract, and enjoining the city from interfering with the mains and pipes already laid, and with the further extension of such pipes and mains; but that complainant shall, within the next 12 months, sink an artesian well or wells, from which to obtain an adequate supply of water for the purposes of the city as called for by the contract; and shall repair and protect the reservoir so as to fully exclude the surface water therefrom; and shall also make the works effective so as to throw the water from the fire hydrants to the height called for by the contract; and the court will retain the case until the expiration of such 12 months, or until the contract shall be substantially complied with at an earlier day, when the final decree will be entered.

ADAMS and others v. MAY and others.

(Circuit Court, S. D. Iowa. June Term, 1886.)

1. PARTNERSHIP—SUITS IN FIRM NAME.

A partnership cannot institute a suit in the firm name alone in the United States courts. The name of each member of the firm must be set forth.

2. COURTS—STATE AND FEDERAL—REMOVAL OF CAUSES—AFFIDAVIT.

An affidavit for the removal of a cause which states that a certain firm is a resident of a different state from the one in which the defendant resides, is insufficient; the name and residence of each member of the firm should be clearly stated.

At Law. Motion to remand to circuit court, Wapello county, Iowa.

Sweeney & Walker, Murphy & Gould, and D. C. Beaman, for plaintiffs.

W. W. Cory and Sloan, Work & Brown, for defendants, intervenors.

LOVE, J. The jurisdictional facts do not sufficiently appear in this case. This being a court of special jurisdiction, it is necessary that the facts which give the court judicial power should clearly appear. There should be nothing indefinite, uncertain, or doubtful in the statement of the facts upon which the jurisdiction depends. It

is the constant practice of this court to remand causes where the jurisdiction here is doubtful. The reasons for this practice are cogent and conclusive. In cases like the present there is no doubt about the jurisdiction of the state courts. Instead, therefore, of retaining such cases here, and going through the forms of trial at great cost and delay, we prefer, when the jurisdiction of this court is at all doubtful, to send the parties back to courts where the power to hear and determine their controversies is not questionable.

Moreover, it is highly inconvenient, as well as expensive, to parties, to carry on litigation here, as compared with the state courts. In addition to this, I may add that the removal act provides that when, at any stage of the case, it appears satisfactorily to the court that jurisdiction does not exist, the cause shall be dismissed or remanded. The amount involved in this case appears to be small. It is difficult to see why it was brought here at all, except for delay. The expenses of the litigation in this court will amount to a large proportion of the sum in dispute. It ought not to be kept here unless the grounds of jurisdiction are very clear. We must look primarily to the petition for removal for the facts of jurisdiction.

The petition in this case states, in substance, that Adams & Co., the plaintiffs, are citizens of Pennsylvania. But who are Adams & Co.? Citizenship cannot be predicated of a firm *eo nomine*. It is settled that a suit cannot be brought in this form originally in the courts of the United States. The individual names of the partners must be set out, and citizenship alleged of each and every of them. The state statute authorizing suits to be brought in the partnership name is inapplicable here. No doubt a cause commenced in a state court in the firm name, without giving the individual names, may be removed to this court; but the petition for removal should state the individual names and citizenship of the members of the firm, and show that no one of them is a citizen of the same state with an adversary partner in the controversy. At all events, this diversity of citizenship should appear in some part of the record, when the case comes here from the state court. This nowhere appears in the present record. For aught that we can see, some member or members of the firm of Adams & Co. may be citizens of the same state with the defendants.

There are other grounds upon which this cause might be remanded, but it is needless to state them.

Let an order be entered, in accordance with the foregoing opinion, remanding the cause to the circuit court of Wapello county, Iowa.

ROOT v. MERRIAM.

(Circuit Court, D. Nebraska. June 26, 1886.)

PROMISSORY NOTES—CONSIDERATION—OPTIONS IN GRAIN.

No recovery can be had on a promissory note, executed in the state of Illinois, where the consideration on which it is based arises from option deals in grain, even though the note may be owned and held by an innocent *bona fide* holder.¹

Suit on Promissory Notes.

Mr. Pritchett, for plaintiff.

Lambertson, Burnham & Holmes, for defendant.

DUNDY, J. This suit is based upon two promissory notes, executed and delivered by the defendant to the parties, and for the purpose hereafter to be stated. Issues were joined, the cause was tried before a jury, and by them a special verdict was rendered, on which both parties claim they are entitled to judgment. The one note was given by the defendant to Martin & Bennett, in the city of Chicago, on the twenty-fourth of February, 1882, for the sum of \$346.25, due in one year from that date. The other note was given to Thomas Bennett, at the same time and place, for the sum of \$500, due in one year from the date of the same. Both were sold and transferred by the respective payees to this plaintiff, before due, and without notice of any alleged infirmity. The only defense interposed is that the consideration on which the notes were based was an *illegal* one, the same having been given in furtherance of a gambling contract, better known, perhaps, as an "option deal" in grain. The jury, by their special findings, fully sustained the truth of the matters on which the defendant relies for his defense. The only question necessary to consider here is, do the facts relied on by the defendant constitute a defense to notes given under such circumstances, when the same have been transferred, before due, to an innocent *bona fide* purchaser, who brings suit here to enforce the payment thereof? The payees in the note induced the defendant to embark in "option dealing" with them, and without any intention on the part of either to deliver any grain, as provided by their contracts. The transactions, as they were carried on from time to time, led to the payment of profits, and the repayments of losses sustained by the defendant. The venture, however, in the end, proved quite disastrous to the defendant, and finally culminated in his giving the notes in suit. At the time the notes were given the laws of the state of Illinois declared that notes given for such consideration should be deemed and held void. If the payees in these notes had brought suit in the state of Illinois, to enforce payment of the same, the result could not have been con-

¹See note at end of case.

sidered doubtful. There would then have been no question of *good faith* on the part of any one for the court to consider. As the laws of the state of Illinois denounce such vicious transactions, and declare to be void notes given in connection therewith, it is not perceived how an innocent purchaser stands in any better attitude than the payees, who knew all about the facts and participated in the wrongs. If the notes were *void* when given, they were void for all purposes and for all time, and any number of transfers would not avail an innocent holder. If the plaintiff has any remedy against any one, and if he is really an innocent purchaser, for value, as he claims, he must seek his redress against the parties who have most likely sought to use him to accomplish a purpose in which they were bound to fail, had they sought relief in their own names.

These findings entitle the defendant to judgment for costs.

NOTE.

Where the consideration of a note, and the foundation of the transaction by which the note was given, both rested on a gambling transaction, though the note be negotiable in form, it is void, even in the hands of a good-faith and innocent holder for value. *Harper v. Young*, (Pa.) 3 Atl. Rep. 670.

A note given for a consideration lost in a gambling transaction is an absolute nullity, (under Code Iowa, §§ 4028, 4029,) and is void even in the hands of an innocent holder. *Traders' Bank of Chicago v. Alsop*, (Iowa,) 19 N. W. Rep. 863.

Where some of the transactions which enter into the consideration of a note are mere gaming transactions, they render the whole void. *Barnard v. Backhaus*, (Wis.) 6 N. W. Rep. 252; S. C. 9 N. W. Rep. 595.

When a demand note, given as security for a continuing option transaction, but valid on its face, was brought in the regular course of business, and for full value, 23 days after date, by one who knew the payees of the note dealt in options, and suspected, but did not know, that it had been taken in some option deal, it was held (1) that the note had been negotiated within a reasonable time; and (2) that the purchaser was a *bona fide* holder without notice, and entitled to recover. *Mitchell v. Catchings*, 23 Fed. Rep. 710.

An Illinois statute provided that all promises, notes, bills, contracts, etc., made upon any gambling consideration should be void; that a court of equity might set aside any such promise, etc.; and that no assignment of any bill, note, agreement, or other security, as aforesaid, should in any manner affect the remedies of any person interested therein. The plaintiff indorsed certain drafts payable to his order, staked them at *faro* and lost. The drafts were subsequently transferred in the usual course of business, and without notice, and for a valuable consideration, to the defendant. In a suit to cancel the indorsements, and to have the drafts delivered to the plaintiff, it was held that the indorsements were void; that the defendant acquired no title to the drafts; and that the plaintiff was entitled to the remedy sought. *Chapin v. Dake*, 57 Ill. 295. But see *Poorman v. Mills*, 39 Cal. 345.

CRAIG and another, Partners, etc., v. McARTHUR and another,
Partners, etc.

(Circuit Court, D. Minnesota. July, 1886.)

CONTRACT—RAILROAD BRIDGE—DAMAGES.

No question of law appears to have been raised in this case. The damages sought by the defendants in their counter-claim were rejected as being too remote, and judgment rendered for the balance found due plaintiffs on their contract.

Action to recover the contract price on an agreement to furnish stone for mason work.

Suit on contracts. Jury waived.

Gordon E. Cole and Lewis & Leslie, for plaintiffs.

Bigelow, Flandrau & Squires, for defendants.

NELSON, J. On February 1, 1884, a contract was entered into between the plaintiffs and defendants, by which it was agreed that the plaintiffs should furnish all the impost and arch stones for the building of a viaduct over the St. Paul & Duluth Railroad, on Seventh street, in the city of St. Paul, at the price of \$8.50 per cubic yard, dressed, and delivered F. O. B. at Mankato, Minnesota. "F. O. B." means "free on board cars."

This contract is evidenced by the following letters:

"MANKATO, MINN., February 1, 1884.

"McArthur Bros., St. Paul, Minn.—GENTLEMEN: We offer to furnish you the impost and arch stones for the viaduct over the St. Paul & Duluth R. R., on Seventh street, in St. Paul, at eight dollars and fifty cents per cubic yard, dressed, and delivered F. O. B. at Mankato, Minn. We also offer to furnish the balance of the masonry required in your contract with the city of St. Paul for the improvement of Seventh street (except coping, curbing, and guttering) at five dollars per cubic yard, dressed, or at two dollars and fifty cents per cubic yard, undressed, F. O. B. in Mankato, Minnesota.

"W. B. CRAIG & Co."

"ST. PAUL, MINN., February 1, 1884.

"W. B. Craig & Co., Mankato, Minn.—GENTLEMEN: In answer to your letter of this day, we accept your proposition of eight dollars and fifty cents per cubic yard for the impost and arch stones for the viaduct over the St. Paul & Duluth R. R., in St. Paul, dressed, and F. O. B. in Mankato. As to your offer for the stone for the balance of the masonry for the Seventh-street improvement, we will answer at an early day, and we hope circumstances will be such that we can accept the same.

"Very truly,

McARTHUR BROS."

The plaintiffs' offer of February 1, 1884, contained two independent propositions: one to furnish impost and arch stones, and the other to furnish stone for balance of masonry. The first was accepted, and on July 5, 1884, was modified, with consent of parties, by the following letter:

"MANKATO, MINN., July 5, 1884.

"*Messrs. McArthur Bros., Contractors for the Improvement of Seventh Street in and for the City of St. Paul*—GENTLEMEN: Under our agreement to furnish you the impost and arch stones for the viaduct over the St. Paul & Duluth R. R. embraced in your contract for the improvement of Seventh street, we have gotten out, and have shipped you, the greater part of about forty impost stones. These were dressed to 'lie on edge' with the assent, as we supposed, of the city engineer, but they have been rejected by him, and we find it would be difficult and tedious to get the impost stone of dimensions required on natural beds. We therefore propose the following modification of our agreement to furnish said impost and arch stones, viz.: That part of the impost stones below the springing line of the smaller arch to be reduced from eighteen inches, as now required, to twelve inches, and that part of the same below springing line of large arch to be reduced to ten inches; you to pay us two hundred dollars towards cost of dressing the rejected impost stones. Those of them sent you, or which may be sent, to be used as part of stone for other masonry which we are furnishing you. In consideration of the foregoing conditions being accepted by you, we will get out, dress, and load on cars for you, at Mankato, within seventeen days, all the impost stones required for said viaduct, and the arch-stones promptly thereafter, as required for the work; said stones to be got out and dressed to lie on natural beds, and in accordance with specifications for said work, and as directed by said city engineer

W. B. CRAIG & Co."

"W. B. Craig & Co.: The city engineer having agreed to the change in dimensions as proposed by you, we accept the foregoing proposition of yours.

"McARTHUR BROS."

On May 10th, the offer to furnish the balance of the stone in letter of February 1, 1884, not being accepted, plaintiffs and defendants entered into the following contract by letters:

"MANKATO, MINN., May 10, 1884.

"*Messrs. McArthur Bros., Con's Seventh-street Improvement, St. Paul, Minn.*—SIRS: We will furnish you the stone suitable for following mason work under your contract with city of St. Paul, as per their specifications, uncut, free on board cars, in Mankato, at following prices, viz.: Stone for center pier St. Paul & Duluth viaduct; stone for spandrel or parapet walls St. Paul & Duluth viaduct; stone for spandrel and backing St. Paul & Duluth viaduct; stone for abutments at east end of bridge, Trout Brook valley; stone for Brook-st. wall. We will furnish sixty-six and two-thirds (66 2-3) per cent. of above-mentioned stone at two dollars per cubic yard, and thirty-three and one-third per cent. free of charge to you, the consideration for the thirty-three and one-third per cent. being included in price for the sixty-six and two-thirds per cent. And any or all stone which you desire to cut before being shipped we will deposit in a suitable place for cutting, and, after they have been cut, we will load them on cars without extra cost to you. We will furnish the above stone promptly, as required by you.

"Yours, very resp'y,

W. B. CRAIG & Co."

"We accept the foregoing proposition.

McARTHUR BROS."

Between the time of the acceptance of the proposition to furnish impost and arch stones and the letter of May 10, 1884, some correspondence and conversation was had between the parties with reference to furnishing all the stone required, in which the plaintiff objected to furnish the impost and arch stones unless he secured the

contract to furnish all stone required. In my opinion the minds of the parties met February 1, 1884, relative to furnishing the arch and impost stones, and that contract was a complete and existing one. It was subsequently modified by consent of parties. See letter and acceptance dated July 5, 1884, *supra*.

The defendants appointed Russell agent and inspector to examine and check stone furnished. The plaintiff delivered, under the first contract, 1,262 yards, measured before dressing, according to his interpretation of the contract; but the defendants contend that the measurement should be made after dressing, and that, according to such measurement, only 1,073 yards were delivered.

I think the defendants are right in their construction. The impost and arch stones were to be delivered dressed, free on board cars, at \$8.50. The value of this amount of stone is \$9,120.50. The amount of stone delivered under the contract of May 10, 1884, measured 1,192 yards, which had been dressed by defendants, and 554.22 yards backing; making, in all, 1,757 yards. To this must be added the waste upon the 1,192 yards cut by the defendants, which, figured at 10 per cent., brings the amount of stone delivered under contract to 1,875 yards. At \$2 per yard for two-thirds of this amount, the value is \$2,500; making the value of stone delivered under the two contracts \$11,620.50. The plaintiffs claim in addition extra work and use of plaintiffs' machinery, by request of defendants or their agent, \$298 for turning stone, delivered under contract of May 10th; \$200 for stone delivered previous to modified contract of July 5, 1884; and \$114.80 for back-dressing some of the ring stones not in the specifications; and \$46.50 for bridge stones and nosing furnished, which in the specifications were stated as granite, and not the stone to be furnished, I think, under the contract of February 1, 1884; also \$87.50 for work in drilling, done at request of defendants' foreman and agent.

These claims are allowed, but some others set forth in the pleadings are disallowed; being stone contracted to be furnished under the contracts according to plans and specifications for the work, including coping.

The defendants in their answer set up several counter-claims, viz., damages for failure to deliver on time agreed on, and for stone not according to contract. I reject all of them.

The damages as proven are too remote.

The defendants have paid on account \$12,076.16, which leaves a balance of \$291.14 due plaintiffs, for which amount judgment is ordered, with interest from December 6, 1884.

HENRY BILL PUBLISHING Co. v. SMYTHE.*(Circuit Court, S. D. Ohio. July 3, 1886)***1. COPYRIGHT—MONOPOLY OF SALE—INFRINGEMENT BY OTHER DEALERS.**

If the owner of the copyright wishes to sell the published work directly and only to individual subscribers, the statute protects him from interference by other dealers who offer surreptitiously obtained copies of the genuine work without his consent, unless there be something in the circumstances of the particular case to estop him from relying on the privileges of his monopoly.

2. SAME—SALE BY SUBSCRIPTION—BREACH OF TRUST BY AGENT—FRAUDULENTLY SOLD COPIES OF THE GENUINE WORK—NOTICE.

The defendant procured genuinely printed copies of Blaine's "Twenty Years of Congress," the copyright of which belonged to the plaintiff, who sold the work only by subscription to single buyers, from a dealer who had obtained them by purchase of an agent of the plaintiff to whom they had been sent for delivery to such subscribers, but without the knowledge or consent of plaintiff and against its instructions to the agent, and in violation of his agreement with the plaintiff not to disobey its instructions in that respect and of his bond to that effect, of which fraudulent conduct the defendant had no notice; but he abstained from making any inquiry into the circumstances of the dealer's possession and right to sell, well knowing that the plaintiff owned the copyright and refused to sell otherwise than by subscription. *Held*, that he would be enjoined from selling these copies, and to account for the profits; that the above-stated circumstances required that he should have made inquiry, and that the failure to make such inquiry was equivalent to notice of the facts; but that the court had no power to enjoin the defendant from future dealing in the work without the consent of the plaintiff, or from any future interference with the trade of plaintiff's agent in the city where defendant resided.

3. SAME—CONDITIONAL SALES.

If the owner of the copyright undertake, by contract, to attach conditions of restriction to his sale of copies of the work, as, if he sells to canvassers upon agreement that they shall sell only by subscription, he must rely solely on the ordinary remedies for a breach of that agreement, and it is not within the protection of the copyright act. But it is otherwise if he sell the copies directly to subscribers through agents having no ownership of the copies sold, as in this case. The incidental protection of the statute belongs only to the owner of the copyright or some part of it, and cannot be transferred by him to mere owners of the copies having no interest in the ownership of the copyright.

In Equity.

The plaintiff is the owner of the copyright of a book, written by James G. Blaine, called "Twenty Years of Congress," and sold it by subscription only, to individual buyers of single copies. The book had never been otherwise placed upon the market by the plaintiff, or with its consent. It employed agents to solicit subscriptions and deliver the copies ordered, assigning to each a certain territory. An agent so employed in New York, to whom plaintiff had sent a number of copies for delivery to certain subscribers procured by him, sold the copies to a book-dealer, in Troy, contrary to plaintiff's instructions, and in violation of an express agreement and his bond that he would not sell or deliver in any other mode than that directed by the plaintiff, applying the money to his own use. It does not appear whether the Troy dealer was aware of this breach of trust or a party to it by

collusion with the agent, but it does appear that it was generally known to the trade, and especially to defendant, that the plaintiff professed to sell the book only by subscription, and had announced by public advertisement and otherwise that in no other way could it be procured from the publishers. The defendant had expressed the belief that the trade could procure the work notwithstanding this announcement, and that he would soon have it for sale. He ordered the book from the Troy merchant, procured six copies of those purchased from the plaintiff's agent in the manner above stated, and sold five of them at a profit of \$5.86. The defendant testified that he was not aware of the facts connected with the Troy dealer's purchase, and there is no proof that he was. He ordered the books without any inquiry upon the subject, and in the usual way of making such orders. The plaintiff's agent at Columbus, Ohio, where defendant does business, notified him that he was the only authorized agent for that section; that the book was sold only by subscription, and warned him not to sell the copies he was offering; but that agent did not himself know how the books had been procured. This bill was filed to enjoin the defendant from selling those copies; for an account, if sold; and from selling the book at all, in the future, without plaintiff's authority. The answer and proof developed the foregoing facts.

D. Stalter and Pugh & Pugh, for plaintiff.

J. M. Tibbitts, for defendant.

HAMMOND, J. It is proper that I should frankly say, by way of apology for a too long delay in the decision of this case, that when it was argued I felt, because of my unfamiliarity with the law of copyright, quite unwilling to assume the responsibility of its decision without an investigation, which has been until now, in the multitude of my other engagements, impossible. To me it was a startling proposition that, in the immense trade that goes on in copyrighted books, the dealer must deraign his title to each copy from the copyright holder with all the particularity of real estate, if not more inexorably, and that no right to use or sell a copy could be acquired without his consent; and I did not see how the argument of the plaintiff could stop short of that claim; and yet I am unable now to see how that monopoly of sale granted by the statute can be secured without a principle almost as broadly stated as that, qualified, of course, by such limitations as may properly and justly should be imposed to estop him, by his own conduct in any given case, from relying on the principle just stated.

How can his right of sale be *exclusive* without that principle in its widest scope? If I own a horse, or 10,000 horses, I have, to be sure, growing out of the very right of property itself, an exclusive right to sell them within the United States, and, indeed, elsewhere. But, surely, this is not the measure of that exclusive right to sell his works

which is granted to an author by the copyright statute. He would have that right, as an incident to his property in the printed copies of the book, without the statutory grant, the other grants of the statute remaining as they are, to create or secure the other elements of his peculiar property in them. Indeed, it is my opinion that from the essential nature of copyright itself would spring this principle of exclusive sale, as I have formulated it, without the especially expressed grant of the statute in that respect.

I cannot find that the English act in terms confers a monopoly of sale, as ours does; and yet, I think, it exists by implication from the statutes as fully as it does under our act. I may be mistaken as to the phraseology of the English acts, but 5 & 6 Vict. c. 45, wherever I find it, seems to omit the words used in our act in reference to the sole liberty of "*vending*" the book copyrighted, as it does many other words there used to define the franchise granted by congress. But while the act of Victoria defines "copyright" to mean "the sole and exclusive liberty of printing, or otherwise multiplying, copies of any subject to which the said word is herein applied," our act of congress uses the language, much amplified, however, of *Millar v. Taylor*, 4 Burr. 2303, and defines the word to mean the sole right of "printing, publishing, and *selling* his literary composition or book." Quoted by GRIER, J., in *Stowe v. Thomas*, 2 Amer. Law Reg. (O. S.) 213, 230; S. C. 2 Wall. Jr. 547; *Graves v. Ashford*, L. R. 2 C. P. 410, 417; Drone, Copyr. 100, 338, 662, 700; Rev. St. § 4952.

Copyright and literary property would be of little value, for want of adequate protection, without this principle, and it must therefore attach to, and be one of, the peculiarities of this creation of the statute. Ordinary remedies protect one's exclusive right to sell his horses, or, what is the same thing, are a sufficient protection to that character of property; but in printed books there is, aside from the material property in them, a peculiarly intangible and incorporeal right pertaining to the authorship,—a property created by this statute,—which requires a further protection that can be adequate only when it is understood that no one can read this book, buy it, or sell it, or otherwise use it, or any copy of it, either that which is piratically or that which has been lawfully printed, without the consent of the author or copyright holder; and the basis of it is that a moneyed or other valuable consideration must be paid to the author, and he has a right to receive value for any use of the product of his labor. Protection in the monopoly of sale for the lawfully-printed copies is just as essential to the value of the right of property created by the statute as protection against piratical printing, publication, and sale of the book. Or, if this be not so, congress has chosen, at least, to grant that right of monopoly, and it may grant what it pleases. It does the same thing for mechanical inventions, and why not for literary products? I think it has. Under our tariff laws an American manufacturer has often a monopoly of the American market, and no

stands very much as the copyright holder does, only the latter has a much stronger, and a more extended and enlarged, monopoly. He relies upon the pains and penalties of the revenue statute for his enjoyment of the monopoly; but, if congress had the same power as in copyright legislation, it might go further and protect the manufacturer more directly and efficiently.

To return to the illustration of the property in horses. If, under the tariff laws, all importations should be forbidden, the American owner of horses would, indeed, have a monopoly of the market. But suppose the government could or should go further, and prohibit all persons, except one citizen, from raising or reproducing horses, and should suppress all reproduction than his own, there would then be growing out of the legislation a monopoly of sale analogous to that conferred in direct terms by this statute on the copyright holder of a book. If the statute should stop at prohibitory legislation, the beneficiary of the monopoly would be compelled to depend wholly on the ordinary remedies to protect it. But this statute does not stop there, and gives the copyright holder especial, if not extraordinary, remedies, at law and in equity, to protect his property, not only against infringement by piracy, but, as I think, against unauthorized sales of genuinely printed copies.

This statute has not abrogated the ordinary law of sales in its relation to copyrighted books, and, like all property, this is subject to that law; but it has provided for it likewise a law of its own, by necessary implication from the statute. We are all familiar with the rule that one buying property of a thief gets no title, no matter how innocent he may be of all knowledge of the theft. Now, let us imagine a state wherein this rule of law has been abrogated by enacting that one who so buys, for a valuable consideration, without notice, shall have a good title, the state undertaking to satisfy our sense of justice by some kind of compensation to the unfortunate owner. If, now, in that state, some thief should sell copies of Mr. Blaine's book, stolen from him there, the purchaser would not get a good title to them notwithstanding the state law; and this because, under the act of congress, Mr. Blaine had granted to him by the statute the exclusive right of sale, which right the courts would protect by appropriate remedies. I do not stop to inquire whether he could bring replevin, trover, detinue, or the like, on the theory that the constitution and laws of the United States being paramount, and Blaine's right of sale *exclusive*, the federal law would exclude the thief's power of sale under the state statute, and there would therefore be necessarily a modification or limitation imposed by the federal statute on that of the state; but, surely, he could appeal to the remedies given by this copyright statute itself to protect him in its enjoyment. Again, if this be a correct view of the nature of this grant of an exclusive right to sell, it does not matter whether the party offering to sell without Mr. Blaine's authority be a thief, or one in possession only by a breach of trust, or

or some other less blamable means of acquisition. The absence of Mr. Blaine's authority to sell his literary property constitutes the defect of title, no matter how that want of authority arises. Owing to the peculiar character of this kind of property, the absence of the author's authority to sell is a defect of *title*, and not a mere want of power. In other words, this monopoly of sale is, of itself, property, and any interference with it should be restrained.

Now, as to what should estop Mr. Blaine, in a court of equity, as between himself and a given party in possession of his books claiming the right to sell them, from relying on any absence of authority from him to sell, or as to what circumstances would enable such a party to invoke the aid of that court to restrain Mr. Blaine from setting up such an absence of his authority, we need not inquire further than the facts of this case demand a decision. It may be that a court of equity would often presume the necessary authority to sell, whether it existed in fact or not; but this would depend rather on Mr. Blaine's own conduct in the premises than anything else. If he has put his copies of the book on the market in such a way as to mislead persons who wish to deal in them as to his authority to sell any particular copies found in the market; if he has sold them by wholesale and retail to merchants; placed them with brokers, factors, auctioneers, jobbers, or other agents, for general sale to all who apply; and the defendant buys from any of these without notice of any defect of title or authority to sell them,—it might be that Mr. Blaine would be without remedy to assert his monopoly in the given case, because estopped by such conduct. The defendant, in such cases, might have a right of sale by estoppel, but the principle we are considering would remain.

And it must not be forgotten, in measuring the equities between parties in all such cases, that while it might be impossible, under some circumstances, to trace the title of each book and its accompanying authority from its author to sell it, this statute has provided ample notice of the author's right; for every book carries the imprint of that notice upon it, and this by the command of the statute. This fact is sufficient, and was intended to put every man who wishes to deal in the book—indeed, every man who wishes to own or read a copy—upon notice that Mr. Blaine owns the copyright, or has transferred it to his publishers, and imposes the duty of reasonable inquiry into the facts of the case to know whether he has been paid or satisfied as to the proposed sale or use, in the matter of his compensation therefor. I do not think, therefore, that the bare fact of the want of actual notice of the defect in the title on the part of the defendant is an answer, in any case, to the plaintiff's claim of infringement; but the scrutiny should go further, and determine whether the statutory notice of the plaintiff's title imprinted in the book has been fairly treated, by especial inquiry, if that inquiry be reasonably demanded by the circumstances of the particular case. I should not

be prepared to say that in this peculiar class of cases the being put upon inquiry is equivalent to notice of plaintiff's rights as to particular copies of the book, but only that equity demands that there shall be, on both sides, reasonable conduct in respect to the dealings of the parties with each other, so that there shall be investigation into the facts relating to the author's authority to sell the book by every one who proposes to deal in it, whenever the circumstances fairly demand that course of business. In this case the circumstances did fairly demand such an examination, and it is useless to decide on the proof whether there was or was not, on the part of the defendant, want of actual notice of the facts involved. He knew that the plaintiff owned the copyright of Mr. Blaine's book; that it had never placed it on the market for general sale by the trade, but had studiously avoided doing that, and had sold it only by subscription to actual subscribers. It had a right to do this, and it was supposed to be a most effectual method of enjoying the monopoly in the profits of the sale which the statute gave. In this way, presumably, the plaintiff would reap the whole profits of the sales, excluding all other dealers and all middle-men, as it had a right to do, from any share of those profits; and, if persistently adhered to, the only copies of the book that could come into the general trade, with the essential authority of the plaintiff to use or sell it, would be those copies sold by subscribers at second-hand, such sales being authorized as an incident of each subscriber's property in his particular copy.

It is quite true that the general trade may not be able to identify those copies which are regularly on the market at second-hand from those which may otherwise surreptitiously come into market, but a little inquiry by mail or telegraph of the copyright holder, and of the dealers offering the book otherwise than by subscription, would generally develop the true facts, and disclose whether particular copies were offered with the essential authority of the copyright holder. In all fairness this inquiry should be made, and, in the absence of it, any infringement of the copyright holder's monopoly of sale cannot be justified by want of actual notice. Here the defendant would have found, by actual inquiry, that these copies he offers to sell were surreptitiously purchased of a fraudulent agent for delivery only to subscribers, and therefore were not authorized for sale in the general market. Technically, the dishonest agent may not have been a thief, and the books were not stolen; but substantially they were stolen from the plaintiff. There is no proof in the case that any conduct of the plaintiff about placing their books on the market was calculated to mislead the defendant, either generally, or as to the particular territory wherein these copies were purchased, and he could not, I think, shut his eyes and ears, keep his tongue silent, and rely on any belief thus acquired that the person from whom he bought had authority to sell. It was a convenient assumption; but his knowledge of the trade, and of the methods adopted by the copyright holder as to this book,

preclude him from relying on it without further inquiry than he shows he made. His experience that all subscription books may be procured for sale in the general market, or his belief of that fact, cannot avail him as a defense here, nor justify his attempt to verify that belief as to this book, by this transaction.

It is useless to inquire whether, under the ordinary law of sales of personal property, the circumstances were such that a purchaser without notice would obtain a good title. As ordinary property, unaffected by the copyright statute, we could have no concern with that feature of this controversy, for, the amount being less than \$500, we would have no jurisdiction. But I have endeavored to show that, outside of and beyond the general law, whatever it may require, the author or his assignee has a special property in his literary work, about which this statute has gathered characteristics, incidents, rights, and remedies which are peculiar to itself, and not affected by the general law. The leading case of *Stephens v. Cady*, 14 How. 528, S. C. *sub nom. Stevens v. Gladding*, 17 How. 447, well illustrates this. There, the purchaser at an execution sale of the copper-plates from which a copyrighted map could be printed, did not acquire the right to print copies of the map and sell them. See, also, *Ager v. Murray*, 105 U. S. 126. No more, it seems to me, can the fraudulent agent for the delivery of copies already sold to particular persons transfer a right to sell them to other persons, which he had not himself possessed, when he deserts his trust, and embezzles the books by selling them to a merchant. If the merchant know of facts that put him on inquiry,—as the fact that this was an existing copyright, under which copies were or had theretofore been sold only by subscription, fairly did,—certainly he should be chargeable as if he were fully informed.

I agree that where one of two persons must suffer by the fraud of an agent, the principal who created the agent should suffer rather than an innocent third party. But a dealer in books, who undertakes to circumvent the author in the execution of any plan that he may adopt—no matter what plan it be, so it be an honest one—for the enjoyment of his monopoly of sale, by showing his skill in the procurement of copies for sale outside of that plan, is hardly an innocent party, when his skill to do that thing requires that he shall purchase through an unfaithful agent, and omit or neglect all inquiry as to the circumstances which enable him to exhibit it at all, as this defendant did. He announced his belief that the books could be procured without individual subscription. He promised to have them for sale, and, in a sense, his pride of opinion was involved in his boast that he could do what he had promised to do. He ordered these books from a comparatively out-of-the-way dealer, who had procured them by fraud upon the plaintiff's well-known and scrupulously followed scheme of marketing them, and now he insists that he did not know of the fraud, when he had made no inquiry as to the peculiar

fact that these books could be so procured for sale at all. He did not inquire, because he knew that it was dangerous to inquire, and with him ignorance was bliss, so long as he could make good his boast to exhibit the book for sale in spite of plaintiff's determination that he should not so sell it, and of the selection of a rival dealer in the same city as its agent to sell by subscription within that territory. This smartness of trade might succeed as to common articles of merchandise, afloat on the seas of commerce, notwithstanding any restrictions of contract on the agents in possession; but even this is doubtful, where the circumstances invite or demand further inquiry; but with a book, protected by copyright, it will not do. The precise ruling I make is this: If the owner of a subsisting copyright seeks to enjoy his exclusive right of selling the published work by making sales directly and only to individual subscribers, the statute protects his plan of sale from interference by other dealers offering surreptitiously obtained copies of the genuine work without his consent, unless there be something in the circumstances of the particular case to estop him from relying on the privileges of his monopoly.

I derive support for this ruling from a mass of cases and authorities on the nature and incidents appertaining to property in copyright too numerous for citation. None of the learned counsel cited a case directly in point, and, after much laborious and patient search, I have been unable, with my somewhat limited facilities, to find one. The citations of counsel from our decisions on patents seem plausible and forcible, as analogies, but, in view of what the courts have said about false analogy in that direction, I have discarded those decisions for fear of being misled by them. *Baker v. Selden*, 101 U. S. 99; *Stowe v. Thomas*, *supra*; 8 Amer. Law Reg. (O. S.) 229; *Id.* 225; BREWSTER, *arguendo*, *Lawrence v. Dana*, 4 Cliff. 178; *Shepherd v. Conquest*, 17 C. B. 427, 444,—where the analogy is vigorously denied. But it is worthy of suggestion that perhaps the analogy is less at fault in this incident of a monopoly of sale than in other features of similarity. Protection for both is secured by the same clause of our constitution, in language that indicates association of thought, to say the least of it. Const. art 1, § 8, cl. 8.

If it be said that this is "protection run mad," as was argued in the case of *Stowe v. Thomas*, *supra*, and as has been, in other language, earnestly urged in argument here, with greater force of application, it may be said, in reply, that albeit "the act of Anne owes its origin to Dutch influence and customs respecting monopolies, which came in with William III., and was passed in the same year with an act to protect wig-makers by prohibiting men from wearing their own hair,"—GOEPP, *arguendo*, 2 Amer. Law Reg. (O. S.) 222,—congress has direct authority in the above-cited section of the constitution for protection to literary property to any extent it may choose, it being alone the judge of that extent; and therefore any odium of the disputed power to protect the wig-makers in a monopoly should not be

visited on this statute. Certainly, congress may prohibit any owner of the paper, twine, and leather called a "book" from selling, using, or enjoying, even by reading, if congress choose, the printed words used to express the ideas therein, until the author has received his compensation in money for his labor in producing those ideas. The only question is the extent to which congress has gone in the legislation under consideration. The purchaser of the paper, leather, and twine does not necessarily purchase the literary property, and he cannot use his ownership of the one to defraud the author of his property in the other. This case illustrates the necessity for maintaining that distinction. Mr. Webster said it was no more an odious monopoly for a man to own his invention—and, we may add, his copyright—than to so possess his homestead. 2 Wall. Jr. 549, note. The principle of protection, as I have sought to apply it, would be fully recognized and conceded in any case of piratically printed copies. Why does it not just as well apply to genuinely printed copies, unlawfully or surreptitiously obtained from the author? I should not hesitate, for my part, to call the latter proceeding a "piracy" or "infringement" of the copyright; but as these words are generally applied to an unauthorized copying of the work, it may be well enough to adopt a suggestion made in argument in *Lawrence v. Dana*, *supra*, 4 Cliff. 27, and call this an "interference" with the copyright. However, it may well be called a "piratical" adventure, judged by its result, which is said in *Scott v. Stanford*, 3 Eq. Cas. 718, to be the true test of infringement, and that the absence of any dishonest intent is immaterial if the result of the appropriator's conduct be to injure the author's right of sale. The author is just as much injured by being deprived of the price of a genuine copy as by having a piratical copy substituted for it, so far as his moneyed interest is concerned; and BRETT, M. R., said, in *Duck v. Bates*, 13 Q. B. D. 843, that what was intended to be protected was the value of the author's invention, which is the key to the construction of the act, and that he does not want sentimental protection.

I have endeavored, without success, to trace the case of *Murray v. Heath*, 1 Barn. & Adol. 804, by citation in some more modern case. Mr. Drone cites it as raising the question "whether a seller is liable for the unauthorized sale of copies which have not been unlawfully printed or imported." Drone, Copyr. 479. He criticises it as unsound, if it undertakes to establish "that the defendants were not guilty of piracy because the copies had been printed from the original plates;" and cites *Stevens v. Gladding*, 17 How. 447, as enunciating the correct rule on that subject. That case, certainly, does construe our statute less strictly than the English statute was construed, and I have already pointed out a difference in the language of the two. But, however this may be, and I do not think there is any substantial difference in the privilege of exclusive right of sale between the English acts and our own, except that ours give directly what the

others necessarily imply, the court, in *Murray v. Heath*, *supra*, was evidently dealing with a different case from that we have in hand. It is a doctrine running through all the cases that whenever the owner of the copyright undertakes, by contract, to attach conditions to his sale of copies of the work, he must rely on the ordinary remedies for a breach of the contract, if it be violated; and this is sound doctrine. Inseparably with the transfer of the title in any copy of the work must go the right of alienation, so far as the peculiar protection of the copyright statutes is concerned; and the conditional or other sales mentioned by CLIFFORD, J., in *Parton v. Prang*, 3 Cliff. 537, 550, to which literary property, like all other personal property, is liable, are not cognizable as copyright cases, when disputes arise growing out of the power of alienation or sale under those contracts. For example, in the last case cited, the artist had a literary property in his painting which he sold without condition. It was not under the protection of our statutes as they then stood; but, if it had been, the ruling must have been the same, for, having parted with his whole title, the right of use was absolute. It is not like the sale of a part and the retention of a part of the property in the copyright, but the sale of the whole estate or interest in certain products of the copyright, with conditions attached. So, in this case of *Murray v. Heath*, *supra*, the bankrupt had been allowed to keep as his own property the genuinely printed copies retained by him. With this ownership, so far as the copyright statute was concerned, passed the right of sale; but the bankrupt agreed he would not sell them, and while it was a clear breach of this agreement for his assignees to offer them for sale, it is plain that the copies were no longer under the protection of the copyright statute. The author had parted with all he had under that statute, namely, his ownership of those particular copies, both in their material make-up and the literary property they represented. Or, as it is often expressed as to inventions, those particular copies had been, by his gift, taken "out of the domain" of the copyright laws, and placed exclusively within that of ordinary property. I do not mean to say that a copyright owner may not sell a part and retain a part of his copyright, by defeasible or conditional contracts for that purpose, but only that in that case the contract was not of that character.

Another illustration is found in *Taylor v. Pillow*, 7 Eq. Cas. 418, where one sold his copyright at auction, but retained copies already printed. As to those copies he had, like any other owner, an inseparable right of alienation by sale, and if he had agreed not to sell them, it would not have put that agreement under the protection of the copyright statute. Again, in *Howitt v. Hall*, 10 Wkly. Rep. 381, S. C. 6 Law T. (N. S.) 348, which I have not seen, and must take at second-hand, the author had parted with his copyright "and the exclusive right of sale" for four years, but the assignee was allowed to sell his stock left unsold at the expiration of the term of four years. 1 Jac. Fish.

Dig. 793; 2 Jac. Fish. Dig. 2398. On the other hand, *Hudson v. Patten*, 1 Root, 133, well illustrates the reverse proposition of this principle. The plaintiff in that case owned the copyright for a given territory, and another owned it for a different territory. The latter employed the plaintiff to print for him a number of copies, to be sold in his own territory, but the defendant, having purchased them, sold them in plaintiff's territory; and it was held piracy or infringement of plaintiff's copyright, although they were genuine or lawfully printed copies. It was not a stipulation of the contract for the printing, that the copies should be sold in a particular territory, which was enforced, but a violation of the plaintiff's copyright, that was redressed. This case is very nearly a direct precedent for the judgment here.

But there can be no happier illustration of the distinction I am endeavoring to take than that afforded by the difference between the case we have in hand and that of *Clemens v. Estes*, 22 Fed. Rep. 899. There, as here, the book was sold by subscription; but the agents had *purchased* the copies of the book, and had bound themselves not to sell, except by subscription. The defendants had no notice of that agreement of the agents, and the court refused to enjoin them. I do not know that I need to express the opinion here, but it seems to me that the court might have gone further, and, on the authority of the cases above cited, held that a sale by the agents in violation of their agreement, even with notice to the defendants, would have been no infringement of the copyright, on the distinction I have endeavored to point out. The agents being *owners* of the copies of the book, had a right to sell them, so far as the copyright goes; and their contract not to sell them was not within the domain of the copyright statute, whatever other remedy in equity or at law there may have been in any court of competent jurisdiction, state or federal, to enforce it. A breach of the contract, or even a conspiracy with the agents to procure a breach, would not be a case arising under the copyright laws of which the federal courts would have exclusive jurisdiction. Rev. St. § 711, subsec. 5. Every breach of contract about a patented article or a copyrighted book does not perforce of that fact belong to the federal jurisdiction to redress as one arising under those laws, and we must not lose sight of that important consideration in such cases as these. Judge BLONDETT intimates this distinction in *Baldwin v. Baird*, 25 Fed. Rep. 293, and it is a familiar one to both our patent and copyright law. Here, the plaintiff did not sell its books to agents with a contract that they would sell only by subscription, but, on the contrary, sold them directly to subscribers, through agents, who had no other function to perform than to solicit subscriptions and deliver the books. The copies in controversy were sent to the agent for delivery, and were never his property, but that of the plaintiff, who was the owner both of the books and of the copyright. It is a most important difference, and one that will reconcile this judgment with all the cases mentioned.

Courts of equity will, whether the property be patented inventions, copyrighted books, or what not, interfere by injunction, in proper cases, to prevent the destruction or injury of property liable to be affected by the peculiar conduct complained of in the given case. It was done in *Springhead, etc., Co. v. Riley*, 6 Eq. Cas. 551, where the cases are reviewed, to prevent strikers from obstructing the plaintiff in securing labor, thereby producing otherwise irreparable mischief. In patent and copyright cases there is a further or cumulative remedy in the courts especially empowered to protect them, as this court is in this case; but it must be, to receive the especial protection, strictly a case involving the patent or copyright itself, or some incident to it, and not simply an ordinary contract concerning the products of the one or the other. The owner of the copyright may not be able to transfer the entire property in one of his copies, and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This *copyright* incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property,—copyrighted articles like any other,—is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with, in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other,—swallows it up, so to speak,—and the two cannot co-exist in any owner of the copy except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy. A genuine copy, owned by the owner of the copyright, carries with it the ordinary incidents of alienation belonging alike to all property, and, if he parts with the copyright, he retains with the ownership of the particular copy this power of sale; or if he sells a copy to another, having, as owner of the copyright, authorized a transfer, the purchaser takes the copy with the ordinary incident of alienation belonging to all property; and *that* copy is no longer under the copyright law. This is the meaning of the cases cited, as I understand them; and, so understood, they do not in the least militate against this judgment.

It is a distinction, illustrated by the cases, between the incident of that monopoly of sale belonging alone to the owner of the copyright, and the incident of that exclusive and inseparable right of alienation belonging always to the owner of a copy of the work lawfully printed,

which appears more plainly under our statute than the English statute, but alike under both, and there should be no confusion of the two, as there is apt to be, if the cases are not very critically observed. In this case the defendant is in no sense the owner of the copies in controversy, having obtained them surreptitiously from the owner of the copyright, or, what is the same thing, from one who so procured them. And here, again, I would especially invite attention to the distinction between the ownership of the mere materials in the books and that of the books as literary products; for he might possibly be the owner of the material elements, and yet not the owner of the literary constituents of the books.

In *Keene v. Kimball*, 16 Gray, 545-551, it seems to have been intimated that the injunction would have been granted if the copy of the play had been surreptitiously obtained. In *Bartlette v. Crittenden*, 4 McLean, 300, S. C. 5 McLean, 32, it is said, in a case where students had published cards copied for instruction from the teacher's system of book-keeping, resting in manuscript: "At common law, independent of statute, I have no doubt the author of a manuscript might obtain redress against one who had surreptitiously got possession of it;" and in *Nicols v. Pitman*, 26 Ch. Div. 374, a stenographer was enjoined from printing a report of a lecture spoken from manuscript to a limited audience. It was put on the ground of a breach of contract, as in the leading case of *Abernethy v. Hutchinson*, 1 Hall & T. 28, where it was said that, no matter how possession was obtained, hearers cannot, either of themselves or by transfer to another, publish for profit that which they had not obtained from the author the right to sell. These cases, and those like them, support this judgment in principle; for if this be true of the common-law right of property in manuscript before publication, it is equally so as to the statutory property in copyright, unless the statute restricts it in some way. It is an incident inherent in literary property, and necessary to its security, whether it be the gift of the common law or the statute.

Although it is not at all a copyright case, in this same view of it, the great case of *Prince Albert v. Strange*, 1 Macn. & G. 25, S. C. 2 De Gex & S. 652, is a potential support for this judgment. I had prepared a careful analysis of that case to show this, but shall not protract my already too long opinion to include it. The defendant was enjoined from exhibiting or selling, for his profit, genuine copies of the etchings surreptitiously procured from the owner's printers; and although, in other respects, the case has been much criticised, as to that part of the injunction there was never any doubt or criticism. The same principle applies here. The defendant had no notice in that case, but it was immaterial, as the lord chancellor said, as it is in other kinds of piratical depredations on literary property. He placed his judgment on the broad and satisfactory ground that "one is entitled to be protected in the exclusive use of that which is exclusively his." And I say this is so, whether it be the exclusive

right of use, or the exclusive right of sale, and whether either be a statutory grant, as here, or, like that case, a common-law grant; and the rule of decision is the same, whether we proceed under the ordinary remedies, at law or in equity, for damages or breach of trust, or whether we exercise the statutory power of protection given by section 4970 of the Revised Statutes. That case also calls attention to the necessity that one who proposes to become a dealer shall make inquiry when he fairly should do so. 2 De Gex & S. 687; Drone, 102, 109, 402, 470, 478, 538. Vice-chancellor BRUCE well remarked that the fraudulent agent could convey no better right than he himself had, and it is very applicable to the facts of this case. 2 De Gex & S. 702. Again, some of these cases, like this, were very small in the mere amount of money involved, but it was adjudicated that "whether profits have been large or small, the question of right of publication is the same." *Nicols v. Pitman*, *supra*; *Prince Albert v. Strange*, *supra*.

I do not wish to close this opinion without saying that I do not exalt literary property above other kinds, nor hedge it about with a divinity of right and remedy not belonging to all other property; but simply place it in the category of all the rest, only finding that, because of its delicate and peculiar characteristics, congress has been invested with peculiar powers of protection for it, which it surely needs to place it on a fair footing with other property. It is especially liable to piratical depredation, like that attempted in this case, whereby the owner loses his fair profits; and I only hold that congress has provided, as a convoy for it, a fleet of rights and remedies particularly adapted for defense against pirates, whether they sail under the black flag of the marauding printer, or the ordinary flags of commerce, falsely displayed for purposes of spoliation. But, after all, other property receives just as full protection, and, when it need be, by other special methods, where the power to devise them exists.

DECREE.

It only remains to say that the plaintiff is entitled to a decree, but there need be no expense for an account. The defendant received six copies, and has sold five, at a profit, he testifies, of \$5.86. This, and the interest on it, he must pay to plaintiff within 60 days, or execution may issue for it. Possibly, he should be made to pay the full publisher's price, but I assume that there should be no controversy over so small a difference, for the money's sake; and, so far as the precedent is concerned, I prefer not to go beyond the profits now, and reserve the point. As to the remaining volume, defendant should be perpetually enjoined from selling it, certainly. I am inclined to think he should also be enjoined from lending it, or even from reading it, and possibly, from every conceivable use of it as a literary production. It is a small matter, perhaps, but, as

the cases show, it is not the extent of the injury, but the character of it, that is involved; and until the plaintiff is paid, and voluntarily consents to part with its property in that copy, the defendant should not injure the plaintiff by lending the book to one who might otherwise buy it, or to a larger number who might otherwise buy, or even by reading it himself, unless he buys the privilege from the plaintiff, its owner. I do not generally hesitate to go in judgment with the logic of my position, but since I doubt whether the court can, under section 4964 of the Revised Statutes, declare a forfeiture of this copy, I hesitate to impose an injunction which amounts to that, although it may be that it is a clear equitable remedy, under section 4970 of the Revised Statutes. Hence I shall, in this case, only enjoin the sale, and reserve the other points, with leave to the plaintiff to apply for an extension of the injunction if the defendant shall refuse to amicably surrender the copy, which he has no sort of right to retain for any use as a literary production, whatever his right may be in other respects. Suppose it were a copyrighted play, the defendant would be enjoined from its exhibition, whether to an audience of one or thousands; and there are cases, of which I took no note, that hold that even a gratuitous exhibition, in places somewhat domestic, might be enjoined as an injury which resulted in keeping people from a desire to see the authorized performance. So, here, this unauthorized genuine copy might be used, as a more certainly piratical one could be, to limit the lawful buyers. Second-hand copies, regularly sold, would do the same, it is true, but that use of them is incidental to property in them, and has been paid for. But perhaps the plaintiff should submit to this injury by one copy as a somewhat inevitable accident of the situation, incident to such property; and in this case, for the present, we will treat it as *de minimis*. Drone, Copyr. 527. But the plaintiff has no foundation for the claim for an injunction restraining defendant from dealing in this book in the future otherwise than as he may deal with the plaintiff, or of interfering with its local agent in his work. It will be time enough to apply whatever remedy it may have when he procures other surreptitious copies, and we cannot adjudicate in advance that he may not have a perfect right to sell any other copies than those involved in this controversy. The defendant will pay the costs. Decree accordingly.